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CYCLOPEDIA OF LAW

Personal Rights and Domestic Relations

BEING

A CLEAR EXPOSITION OF THE RIGHTS OF INDIVIDUALS AND THE DOMESTIC RELATIONS, INCLUDING A COMPLETE ANALYSIS OF THE FIVE TOPICS: HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT

VOL. III

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PREFACE.

The preparation of the present volume was begun with some trepidation as to the practicability of presenting in so small a compass the essential elements of the two important subjects: "Personal Rights" and "The Domestic Relations." The success of the second volume of the series—Handbook of Constitutional Law—which has been used by students in preparing for the Ohio bar examination, and found sufficiently complete to enable them to pass with perfect grades, has encouraged the author to believe that the present volume may be found equally satisfactory for the use of students. Many things have been passed with but brief notice, some topics have been omitted altogether, but the most important principles have been presented with as much detail as the scope of this work would permit.

In the compilation of this volume we have been profoundly impressed by the fact that legal rights—the foundation of human liberty—though claimed to be grounded in natural law and justice, are purely developmental and evolutionary, and that their completest stage has not been reached. In the fifteenth century the rights of the people were recognized to a certain extent; the laws of the nineteenth century admit the

rights of the people to a greater extent; and the laws of the twentieth century are destined to give a still more complete sanction to personal liberty unless evolution fails and reaction triumphs.

"Justice is the great interest of man on earth," and though many powerful and ancient institutions may stand in the way of its realization, yet one by one these shall crumble away and man attain to his supremest goal. "The law hath not been dead, though it hath slept." Certain selfish classes deem it to their interest to keep the law sleeping—to prevent its development; yet there is to be a better law than any constitution now existing. The good law of a century ago may be the crowning evil of to-day. "Laws grind the poor, and rich men rule the law," says the poet of yesterday; "the sober second thought of the people shall be law," says the evolutionist of to-day, and then, indeed, will it prove the golden chain which binds the universe to the throne of Justice.

What has been said by the author in criticism of the present laws has been with the hope of encouraging in the minds and hearts of the youths who shall peruse these pages a desire for that juster system of laws which is to be; and to prepare them for the work they will have to perform as citizens and legislators in securing more perfect liberty for the individual, and more lasting security for the nation.

CHARLES E. CHADMAN.

ABBREVIATIONS.

- Add. Ec.—Addams' Ecclesiastical Reports. (Eng.)
Allen—Allen's Massachusetts Reports.
A. K. Marsh.—A. K. Marshall's Reports. (Ky.)
Am. Rep.—American Reports.
Bing. (N. C.)—Bingham's New Cases. (Eng. Common Pleas.)
Bl. Com.—Blackstone's Commentaries.
Barb.—Barbour's Reports. (N. Y. Sup. Court.)
Bouv. Dict.—Bouvier's Law Dictionary.
Car. & P.—Carrington & Payne's Reports. (Eng. Nisi Prius.)
Cal.—California Reports.
C. & F.—Clark and Finnelly's Reports. (Eng. H. of L.)
Ch. D.—Chancery Division Reports. (Eng.)
Civ. Govt.—Civil Government.
Cont.—Contract.
Conn.—Connecticut Reports.
Co. Litt.—Coke on Littleton.
Cush.—Cushing's Reports. (Mass. Supreme Court.)
Dom. Rel., or D. Rel.—Domestic Relations.
Eq. Juris.—Equity Jurisprudence.
Ga.—Georgia Reports.
Greenl. Ev.—Greenleaf's Evidence.
Hag. Con.—Haggard's Consistory Reports. (Eng.)
Hag. Eccl.—Haggard's Ecclesiastical Reports. (Eng.)
H. of L.—House of Lords, Cases or Reports.
How. Pr.—Howard's Practice Reports. (New York.)
Ia.—Iowa Reports.
Inst.—Institutes of the Civil Law.
Johns. (N. Y.)—Johnson's New York Reports.
Johns. Ch.—Johnson's Chancery Reports.

Kans.—Kansas Reports.
 Kent Com.—Kent's Commentaries.
 Ky.—Kentucky Reports.
 L. R.—Law Reports. (Eng.)
 L. R. Ex.—Law Reports Exchequer Division. (Eng.)
 Mast. & Serv.—Master & Servant.
 M. & D., or Mar. & Div.—Marriage and Divorce.
 M. & W.—Meeson & Welsby's Reports. (Eng. Excn.)
 Md.—Maryland Reports.
 Me.—Maine Reports.
 Minn.—Minnesota Reports.
 Mod.—Modern Report. (Eng.)
 Monr. B.—B. Monroe's Reports. (Ky. Ct. of App.)
 Nebr.—Nebraska Reports.
 N. C.—North Carolina Reports.
 N. H.—New Hampshire Reports.
 N. J. Eq.—New Jersey Equity Reports.
 Nev.—Nevada Reports.
 N. Y. Supr.—New York Supreme Court Reports.
 O. St.—Ohio State Reports.
 Paige—Paige's N. Y. Reports.
 Pro. Div.—Probate Division. (Eng.)
 Schoul.—Schouler.
 Salk.—Salkeld's Reports. (Eng.)
 Stra.—Strange's Reports. (Eng.)
 Sid.—Siderfin's Reports. (Eng.)
 Stim. Am. Stat. L.—Stimson's American Statute Law
 T. R.—Term Reports. (Eng.)
 Vt.—Vermont Reports.
 Ves.—Vesey's Reports. (Eng.)
 Wend.—Wendell's Reports. (N. Y.)
 West. L. M.—Western Law Monthly.
 Wms. P.—P. Williams' Reports. (Eng.)

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PERSONAL RIGHTS

OR

THE ABSOLUTE RIGHTS OF INDIVIDUALS.

CHAPTER I.

RIGHTS DEFINED, AND PERSONAL RIGHTS EXPLAINED.

Sec. 236. MEANING OF RIGHTS.—A right generally is defined to be “one man’s capacity of influencing the acts of another, by means, not of his own strength, but of the opinion or force of society.”*

A legal right is defined by the same author to be, “a capacity residing in one man of controlling, with the assent and assistance of the State, the actions of others.” It has also been defined as “a legally protected interest.”

The above definition of a right, as the word is used in correct legal terminology, is to be distinguished from the ambiguous uses of the term as opposed to “wrong,” and by Blackstone in his division of “rights of persons” and “rights of things.”

Sec. 237. THE LAW CREATES AND PRESERVES RIGHTS.—“The end of the law,” says Locke, “is not to abolish or restrain, but to preserve or enlarge freedom.”** The means by which law regu-

*Holland’s Jurisprudence, p. 71.

**Locke’s Civil Government, I., Sec. 57.

lates society and enhances the welfare of individuals is by the creation and protection of legal rights. As an institution for the establishment and perpetuation of individual and social rights it subserves the well-being of society, and affects, in the highest degree, the progress of civilization.

A legal right has validity and force solely from its recognition and enforcement by the State. The intervention of the State, upon its own motion, or when called on, in compelling the performance of specific acts and punishing the doing of others which it has declared illegal, is known as the sanction of law.

Law defines the rights which it will aid, and specifies the way in which it will aid them. As it defines, or creates, it is Substantive law. So far as it provides a method of aiding and protecting, it is Adjective law, or Procedure.

Rights, being thus created and protected by the law, which is the expression of the sovereign will of the ruling body, should, in our country at least, be formulated and fostered by public opinion.*

Sec. 238. RIGHTS AND DUTIES CONSIDERED.—Every right implies the active or passive furtherance on the part of others, and such furtherance on their part is said to be their duty. Hence the terms "rights" and "duties" are correlative, or express the same state of facts viewed from opposite sides. That is, persons are equally subjects of rights and duties. Rights inhere in persons, but in order that these

*Holland's Jur., Chs. 7 and 8.

rights may be uniform and equal duties are incident to the same persons.

The purpose of law is to equalize, and to guarantee that all enjoy their rights, and to this end it compels the performance of duties. Whenever rights are imperiled by wrongdoing, or even a threat of it, the law interferes to restore the previous condition or prevent the contemplated injury.*

Sec. 239. MEANING OF "PERSONAL RIGHTS."—The branch or division of law known as "Personal Rights," results from Blackstone's classification of the law in the first book of his Commentaries. After first dividing the realm of law into the two great divisions "rights that are commanded" and "wrongs that are forbidden," he thus continues:

Rights are, however, liable to another subdivision; being either, first, those which concern and are annexed to the persons of men, and are then called *jura personarum*, or the rights of persons; or they are, secondly, such as a man may acquire over external objects or things unconnected with his person, which are styled *jura rerum*, or the rights of things. Wrongs also are divisible into, first, private wrongs, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and, secondly, public wrongs, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors.

The objects of the laws of England falling into this four-fold division, the present commentaries will therefore consist of the four following parts: 1. The rights of persons, with the means whereby such rights may be either acquired or lost. 2. The rights of things, with the means also of acquiring and

*Holland's Jur., Chs. 8 and 13.

losing them. 3. 'Private wrongs, or civil injuries, with the means of redressing them by law. 4. Public wrongs, or crimes and misdemeanors, with the means of prevention and punishment.—I. Bl. Com., 122.

Sec. 240. SAME SUBJECT—CRITICISM OF BLACKSTONE'S DIVISION.—Judge Cooley in a note to this section of Blackstone criticises the division of "rights of persons" and "rights of things" as being the same thing, for, as he observes, "all rights whatever must be the rights of certain persons to certain things. Every right is annexed to a certain character or relation, which each individual bears in society. The rights of kings, lords, judges, husbands, fathers, heirs, purchasers and occupants, are all dependent upon the respective characters of the claimants." (Cooley's Bl. Com. I., 122n.)

But, as the eminent judge in the same connection remarks, "the order of legal subjects is, in a great measure, arbitrary, and does not admit of that mathematical arrangement where one proposition generates another, it perhaps would be difficult to discover any method more satisfactory than that which the learned judge has pursued, and which was first suggested by Lord Ch. J. Hale."

Sec. 241. SAME SUBJECT—SCOPE OF THIS TREATISE.—Blackstone's division, "Rights of Persons," includes the subject of Constitutional Law, Domestic Relations, and Corporations, but the present treatise is not intended to cover the same ground. as each of these subjects is designed to be

treated separately in the Home Law School Series. The subject of "Personal Rights" as a branch of modern law is usually limited to a consideration of those absolute rights of individuals which are guaranteed by the Federal and State bills of rights, together with an outline of the remedies for a violation of these rights.

The scope of the present subject, then, will be a consideration of those absolute or natural rights discussed by Blackstone, and the subject will be treated in the same general order with the necessary changes incident to our modern institutions and laws.

Sec. 242. NATURAL AND ARTIFICIAL PERSONS.—Persons are divided by the law into either, 1, Natural Persons, or, 2, Artificial Persons.

Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic. (I. Bl. Com., 123.)

Sec. 243. RIGHTS ARE ABSOLUTE AND RELATIVE.—Considered in their natural capacities, the rights of persons are either, 1, Absolute, or, 2, Relative.

Absolute rights are those which belong to human beings as such, and which it is the duty of every individual to respect; they belong to men as individuals or single persons. They are termed "absolute," in contradistinction to those to which corresponds the duty of a particular person to do or forbear from doing some act, which are termed relative.

Relative rights, then, are those which are incident to persons as members of society, or as standing in the various private and legal relations. (I. Bl.Com., 123.)

The word "absolute," as applied to rights or duties, imports that they are so in a strict and primary sense, and are such as a man is entitled to enjoy, or forced to observe, whether out of society or in it. In regard to absolute duties, which man is bound to observe considered as a mere individual, Blackstone observes that, "it is not to be expected that any human municipal law should at all explain or enforce them." Let us quote his reasoning:

For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself (as drunkenness, or the like), they then become, by the bad example they set, of pernicious effects to society, and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the case. Public sobriety is a relative duty, and therefore enjoined by our laws; private sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know, and therefore they can never enforce it by any civil sanction. But, with respect to rights, the case is different. Human laws define and enforce as well those rights which belong to man considered as an individual, as those which belong to him considered as related to others.—I. Bl. Com., 124.

Sec. 244. IMPORTANCE OF THE PROTECTION OF ABSOLUTE RIGHTS.—“The principal aim of society,” observes Blackstone, “is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals. Such rights as are social and relative result from, and are posterior to, the formation of States and societies; so that to maintain and regulate these is clearly a subsequent consideration. And, therefore, the principal view of human law is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple; and then such rights as are relative, which, arising from a variety of connections, will be far more numerous and more complicated.” (I. Bl. Com., 124.)

Sec. 245. ABSOLUTE RIGHTS, NATURAL LIBERTY, AND CIVIL LIBERTY.—“The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind.

“This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or

control, unless by the law of nature. . . . But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it. For no man, who considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life.

“Political, therefore, or civil liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public.” (I. Bl. Com., 125.)*

Sec. 246. THE EFFECT OF THE PROTECTION OF ABSOLUTE RIGHTS.—The effect of

*Political liberty as now distinguished from civil liberty consists in an effectual participation by the people in the making of laws. Cooley, *Principles*, 3d ed., 247.

Rights are the offspring of law; they are born of legal restraints; by these restraints every man may be protected in their enjoyment within the prescribed limits; without them possession must be obtained and defended by cunning or force (*idem.*).

protecting absolute rights is the establishment of civil liberty. The law in defining rights and compelling their recognition indicates that its desire "is not so much the limitation as the direction of a free and intelligent being or agent to his proper interest, and prescribes no further than is for the good of those under the law."* Blackstone reasons, "that the law which restrains a man from doing mischief to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind." "But," he continues, "every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny." (I. Bl. Com., 126.)

Professor Holland observes, "Law is something more than police, its ultimate object is no doubt nothing less than the highest well-being." (Jurisprudence, Ch. vi.) Hence we conclude that the law, by the immediate creation and protection of rights, seeks its remoter object—the general security and well-being.*

Sec. 247. WHAT GOVERNMENT BEST SECURES CIVIL LIBERTY.—According to Blackstone, "that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty which leaves the subject entire master of his own conduct, except in those points wherein

*Locke, *Civ. Govt.*, I., Sec. 57: "The only defensible object or end of law is the maximization of the happiness of the greatest number of the members of the community in question;" *idem*, *Works*; II., p. 6.

the public good requires some direction or restraint." (I. Bl. Com., 126.) To this we would add, that the restraints, when exercised, should be equal to all, as well as uniform and just.

"It is true," says Judge Cooley, "that civil liberty may exist in perfection under an absolute monarch. But what security can the subjects have for the virtues of his successors? Civil liberty can only be secure where the king has no power to do wrong, yet all the prerogatives to do good."*

As we have seen in the preceding section, every wanton restraint, from whatever source, is a degree of tyranny, and an infraction of civil liberty, so we can but conclude that the protection and advancement of human rights is best secured by institutions which keep the law-making power and the conduct of government in the hands of the people. Equality, which is the basic principle of all liberty, can only be preserved by giving each an equal share in the common government.

Representative assemblies or legislatures, and elected officers, without adequate restraints imposed by the people, may, under the corrupting influences of a conscienceless wealthocracy, become as inimical to liberty as the most absolute monarch. Hence

*Cooley's Bl. Com., I., 126n: It is worthy of notice that the only monarchy in which the subjects are admitted to have some degree of civil liberty is one in which the monarch has not dared to annul a measure passed by the people's delegates in Parliament for 207 years. See Vol. II., Home Law School Series, Sec. 129.

it behooves the people by the ballot, and the institution of the referendum and recall, to look to their liberties. The lesson of history is, that the delegate, whether a monarch deputed by God, an aristocrat selected by the nobility, or a plain citizen elected by the people, is prone to use the power granted him for the oppression and enslavement of his fellowmen.*

*At present, in the United States, a grave problem confronts the people. It is, whether civil and political liberty shall end, or whether the principles of monopoly and plutocracy shall be curbed. It is nonsense to prate of equality before the law, and uniformity of rights and privileges, when a few gigantic trusts can defy the courts, corrupt by bribery and intimidation executive and legislative officers, and reduce our intelligent laborers (the backbone of the nation) to the condition of any of the most abject races, black or brown, which can be found to compete with them as machine running automata.

The citizen who is compelled to fawn and look pleased to get a chance to delve in the mine or labor in the shop ten or more hours a day for a paltry wage, and then sees the bulk of his earnings go to the coal trust, oil trust, meat trust, etc., which have established themselves for the sole purpose of levying tribute through the control of necessities, has not much reason to feel proud of his civil liberty. And we believe that the only persons who can praise this sort of liberty are the idiotic and the paid tools of the monopolists.

We cannot escape the fact that vested capital (the stolen labor of yesterday), given an artificial personality by the laws of the State and nation, is usurping the civil liberty of the masses and threatens to destroy our fabric of government. Political liberty, or the right of the people to participate in government freely and equally, is being undermined by the same forces. The harassed laborer, fearful of losing his job,

Sec. 248. THE ESTABLISHMENT OF ABSOLUTE RIGHTS.—Absolute rights, though founded on nature and reason, owe their establishment and recognition to human laws and authority. As Blackstone notes, they are subject to elevation or depression, according to the character of the government on which their nurture depends; and their development, in every instance, is characterized as a growth rather than a revelation. The fundamental principles of human rights and liberties have been evolved, step by step, article by article, in the struggles and revolutions waged against the savage tyranny of selfishness and greed. Let us note the monuments which mark the expansion and assertion of these rights in England; we quote from Blackstone:

First, by the great charter of liberties, which was obtained, sword in hand, from King John, and afterward, with some

must vote for the interest of his so-called employer; thus political freedom is fast becoming a dream.

But, it is asked, what is the solution? What is to be done in the premises? And for answer we ask, What has been the solution of the crises of the past, when the people realized that they were being robbed of their birthright—life, liberty and happiness? The answer and the remedy of the past must be the answer and the remedy of the present. As we celebrate the overthrow of the oppressors of the past, and enforce the restrictions which were then devised to limit the despotic king and nobles, so will our posterity praise and protect such charters as we may devise to restrain the industrial despots of the present. When human liberty is in danger, resistance to King Millionaire is as much in order as resistance to King John at Runnymede, or to King George at Bunker Hill!

alterations, confirmed in Parliament by King Henry III., his son. Which charter contained few new grants; but, as Sir Edward Coke observes, was for the most part declaratory of the principal grounds of the fundamental laws of England. Afterward, by the statute called *confirmatio cartarum*, whereby the great charter is directed to be allowed as the common law, all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people, and sentence of excommunication is directed to be as constantly denounced against all those that, by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next, by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two), from the first Edward to Henry IV. Then, after a long interval, by the Petition of Right, which was a parliamentary declaration of the liberties of the people, assented to by King Charles I. in the beginning of his reign. Which was closely followed by the still more ample concessions made by that unhappy prince to his Parliament before the fatal rupture between them, and by the same salutary laws, particularly the habeas corpus act, passed by Charles II. To these succeeded the Bill of Rights, or declaration delivered by the lords and commons to the Prince and Princess of Orange, 13th of February, 1688, and afterward enacted in Parliament, when they became King and Queen; which declaration concludes in these remarkable words: "And they do claim, demand and insist upon, all and singular the premises, as their undoubted rights and liberties." And the act of Parliament itself recognizes "all and singular the rights and liberties asserted and claimed in the said declaration to be the true, ancient and indubitable rights of the people of his kingdom." Lastly, these liberties were again asserted at the commencement of the present century, in the act of settlement, whereby the crown was limited to his majesty's illustrious house; and some new provisions were added, at the same fortunate era, for better securing our religion, laws and liberties, which the statute declares to be "the birthright of the people of England," accord-

ing to the ancient doctrine of the common law.—I. Bl. Com., 127, 128.

So in America, though we borrowed from the mother country all the great charters of liberties which Blackstone enumerates, we have not ceased to develop absolute human rights. The superiority of the rights of man to any government or institution is the gist of the Declaration; the establishment of equality and the renunciation of hereditary distinctions is the most worthy aim of the Constitution; and civil, political and religious liberty are enhanced by both State and Federal bills of rights. Nor were these advances made without the struggle and travail necessary to overcome the accustomed resistance. "Each free institution cost society a hundred battlefields." And the gain of truth, in order to blossom and bear fruit—liberty and equality—has been watered by the tears and nourished by the blood of martyrs and patriots.*

*We are apt to forget, or purposely omit to notice, as does Blackstone, the social forces and the teachings that have been the immediate cause of advancing human rights and liberties. During the period when Magna Charta was being forged into a chain for the restraint of tyranny, the "mad priest of Kent," thus harangued the slave-like peasants:

"Good people, things will never go well in England so long as goods be not in common, and so long as there be villains (vassals) and gentlemen. By what right are they, whom we call lords, greater folk than we? On what grounds have they deserved it? Why do they hold us in serfage? If we all came of the same father and mother, of Adam and Eve, how can they say or prove that they are better than we, if it be not that they make us gain for them, by our toil, what they

Sec. 249. THE THREE PRIMARY CLASSES OF ABSOLUTE RIGHTS.—The absolute rights of individuals, in those countries where liberty has had its fullest growth, are arranged in three principal or primary articles: 1, the right of personal security;

spend in their pride? They are clothed in their velvet and warm in their furs and ermines, while we are covered with rags. They have wine and spices and fair bread, and we eat oat-cake and straw and water to drink. They have leisure and fine houses. We have pain and labor, the rain and the wind in the fields. And yet it is of us and our toil that these men hold their state." Quoted from Lancaster's *Hist. of Eng.*, p. 86.

From these questions and this reasoning sprang the charters of liberties and tenets of equality; from such arguments came the spirit of unrest which lightened the Mid-Ages and burst forth in the glad sunshine of Declarations of Independence and Equality, and inspired the revolts which overthrew the monopoly of government. "By what right are they, whom we call lords, greater folk than we? On what ground have they deserved it? Why do they hold us in serfage?" Ah, these are the questions that sometimes occur to the "man with the hoe." And woe betide the lordlings that do not relax their power when these queries have unified the workers!

Are not the same questions being asked as to the justice of the new form of oppression and serfdom which has come upon us? By what right are they, whom we call captains of industry, greater than we? By what means have they attained their positions? Why are they permitted to enthrall the workers? The king, the noble, the priest, with unlimited power, was actual tyranny and a continued menace to liberty. Each of these has been overthrown by the "mad priests" of the past. But are not the captains and "lords" of industry of the present just as formidable and tyrannous? The noble

2, the right of personal liberty; 3, the right of private property.

The rights included in these divisions have been developed by the various charters, constitutions and statutes enacted by the people, and consist, as Blackstone observes, in a number of private immunities, either a residuum of natural liberty, not sacrificed by the laws of society to the public convenience; or else those civil privileges, which society provides in lieu of natural liberties given up by individuals. And the same author further observes that "the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense." (I. Bl. Com., 129.) It is these classes or articles of rights which are to be considered in our next chapter.

with a thousand serfs—the millionaire with ten thousand wage-slaves—how are we to distinguish them on principle?

They of the past were oppressed by the principles of vested rights and hereditary distinctions working a monopoly of power. We have vested rights and unprincipled individualism working a monopoly of industry.

Where are the leaders who shall solve this modern problem and vanquish the idols and monsters of the twentieth century? Ah, they are here, but instead of being welcomed as saviors and leaders, they are as yet but "mad priests" in the wilderness. Such is the course of evolution. Each stage must be gone through. From the worm the butterfly; from the "mad priests" come the Gracchi, the Cromwells, the Washingtons, the Lincolns. We build monuments to the heroes (fools) of the past; we stone those whom our posterity will honor. Verily, we belong to the same simian tribe, and have the same traits as our ancestors.

CHAPTER II.

ABSOLUTE RIGHTS, AND REMEDIES FOR THEIR INFRINGEMENT

Sec. 250. GENERAL CLASSIFICATION.—As we have seen in the preceding chapter, the absolute rights of individuals fall in one or the other of the general divisions: 1, Personal Security; 2, Personal Liberty; or, 3, Private Property. These divisions we shall consider in their order, together with the remedies for their violation.

I. Personal Security.

Sec. 251. MEANING OF PERSONAL SECURITY.—The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation. (I. Bl. Com., 129.)

Sec. 252. SECURITY OF LIFE.—“Life,” says Blackstone, “is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in its mother's womb.”

Injuries affecting the life of man, are justly considered as the most atrocious species of crimes, and while the immediate injury is to the individual alone, the ultimate effect of such crimes is the subversion of all civil society. From the remotest ages the remedy or punishment for the taking of life, has invariably been to deprive the offender of his life. The life of man cannot be restored when taken, nor

properly compensated in damages. The best that the law can do is, by affixing the greatest possible penalty to the offense, seek to minimize its occurrence by the severity of the punishment. See III. Bl. Com., 119; IV. *idem.*, 176-7.

In a few of the States of Union capital punishment has been abolished. But in a majority of States and in nearly all civilized countries, the death penalty is still inflicted for felonious homicide. In a number of States unlawful homicide or murder is divided by statute into degrees, and the punishment inflicted according to the grade of the crime.*

Sec. 253. SECURITY OF LIMBS.—Next to a man's life, the common law regarded the limbs or members of a person which are useful to him in fight. These, in the language of Blackstone, are also the gift of the wise Creator, to enable man to protect himself from external injuries in a state of nature. The common law regarded as a very serious crime the offense of mayhem, or the depriving another of any member useful in fight. (I. Bl. Com., 130; IV. *idem.*, 205-7)

Sec. 254. SAME SUBJECT—SELF-DEFENSE AND DURESS.—In defense of life and limbs, when attacked, a man is pardoned though he take the life of his adversary. His resistance and acts are regarded as done upon necessity and compulsion. So, where a man in fear of death or mayhem, is compelled to execute a deed or do any other legal act, these

*See Rev. Stat. Ohio, Secs. 6808-11.

acts may afterwards be avoided. A man thus constrained is said to be under "duress."

Blackstone specifies two sorts of duress: "duress of imprisonment, where a man actually loses his liberty, and duress per minas, where the hardship is only threatened and impending." The same author states that duress per minas is either for fear of loss of life or mayhem, and it must be upon sufficient reason, and not unfounded. "A fear of battery, or being beaten, though ever so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages; but no suitable atonement can be made for the loss of life or limb." (I. Bl. Com., 131.)

Sec. 255. SAME SUBJECT—SUPPORT.—The common law, as well as its great commentator, recognized that the protection to life and limb might prove futile, unless some provision were made for the gaining of a livelihood or the means of support in all cases. In this connection Blackstone observes, "there is no man so indigent or wretched but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor."*

*I. Bl. Com., 131: It is passing strange that while we still recognize the right of assisting individuals in extremis, that there are those who resist the right of the common government, by modifying conditions, to prevent a freeman from being reduced to this pitiable plight.

Sec. 256. SECURITY OF BODY.—The body as well as the members useful for offense or defense are entitled to protection from corporal insults of every kind. Injuries to the body and limbs of a person may be in the way of a threat, assault, beating, wounding or mayhem, each of which we shall notice briefly.

1. Threats. These constitute an inchoate rather than an absolute violence. The injury consists in the threats and menaces of bodily hurt, through fear of which a man's business is interrupted. Both a menace and a consequent inconvenience are necessary to complete the wrong. The common law remedy for this injury lies in money damages recoverable by action. At present the person threatening may be compelled to enter into recognizance with sureties to keep the peace.

2. Assault. At common law an assault is explained as an offer to beat another, without touching him; as where one lifts up his cane, or his fist, in a threatening manner at another; or strikes at him, but misses him; this is an assault. It is an inchoate violence of a higher nature than mere threats, and an action for damages is also given. The offense is defined by State statutes.

3. Battery. This is defined as the unlawful beating of another. The least touching of another's person wilfully, or in anger, is a battery. A battery may be justified where one has the authority of a parent, master, teacher, etc., or where it is done in self-defense. And because of these instances of justification, the offense is better defined as the unlawful beating of another. An appropriate action for damages is given.

4. Wounding. This consists in giving another some dangerous hurt, and is only an aggravated species of battery.

5. Mayhem. Consists in violently depriving another of the use of a member proper for his defense in fight. The common law regarded the loss of an arm, leg, finger, eye, front tooth, etc., as mayhem; but the loss of a jaw tooth, ear or nose was not held to be mayhem. An action for damages was given, and in particular cases these damages were trebled by statute.*

The common law, as well as the statute law, in force in the various States, regards the offenses just described as crimes for which an indictment lies, as well as a civil action for damages. These will be more fully considered under the subject, "Criminal Law," in a succeeding number of the series.

Sec. 257. PROTECTION TO HEALTH.—A man's health is to be protected from such practices on the part of others as may affect or destroy it. At common law, "any unwholesome practices of another," by which a man sustains damage in vigor or constitution, were actionable. Thus, selling bad provisions or wine, the exercise of a noisome trade which infects the air in the vicinity, and unskillfulness in a physician, surgeon or apothecary, which were wrongs unaccompanied by force, were remedied by the special action for damages, called "trespass upon the case." (III. Bl. Com., 122.) Modern statutes preserve and enlarge the

*See III. Bl. Com., 120, 121.

remedies given by the common law. Pure food laws have been passed in various States, inspection of the chief articles of diet are provided for, and appropriate penalties provided for manufacture or sale of impure or adulterated foods or drugs.* Damages are recoverable for malpractice, or the negligent or incompetent treatment by a physician or surgeon, and quite generally registration laws, prescribing the qualifications of dentists, doctors, druggists, etc., are enforced in the several States.

Sec. 258. PROTECTION TO REPUTATION.—“Every man,” says Blackstone, “is entitled, by reason and natural justice, to the security of his good name and reputation from the arts of detraction and slander,” observing, that without these, it is impossible to have the perfect enjoyment of any other advantage or right. (I. Bl. Com., 134.)

A person's reputation and good name may be injured by the acts or offenses of others known as slander, libel, and malicious prosecution, each of which we shall consider briefly.

Sec. 259. SAME SUBJECT—SLANDER.—Slander is oral defamation, by speaking malicious, scandalous and untrue words tending to the damage and derogation of a person. Damages may be recovered by action in each of the following cases: 1, For words falsely spoken of a person, which impute to him the commission of some criminal offense involving moral turpitude, for which the party, if the charge were true, might

*See Rev. Stat. of Ohio, Tit. V., Ch. A.

be indicted and punished; 2, words falsely spoken of a person, which impute that he is infected with some contagious disease, where, if the charge were true, it would exclude the party from society; 3, words falsely spoken of a person, which impute to him unfitness to perform the duties of an office or employment of profit, or the want of integrity in the discharge of the duties of such an office; 4, words falsely spoken, which prejudice him in his profession or trade; 5, defamatory words falsely spoken of a person, which, though not in themselves actionable, occasion him special damage. (*Pollard v. Lyon*, 91 U. S., 225.)

The slanderous words mentioned in all save the last division above are said to be actionable *per se*, that is, by or in themselves, for which damage is presumed to have happened and need not be proven. In other cases, and where the words do not apparently import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened because of their utterance. The defendant may always prove the words spoken to be true, and then no action lies, though damage has occurred, for speaking the truth is no slander or false tale. So, mere advice, criticism, or warning are not actionable. This action is now defined by statute and mitigating circumstances may always be shown to reduce the damages.* (*Cooley's Bl. Com.* III., 123-5 note.)

Sec. 260. SAME SUBJECT—LIBEL.—Written

*Rev. Stat. Ohio, Sec. 5094.

slander, or libel, in its most extensive meaning, signifies any malicious defamation, expressed either in writing, printing, pictures, or effigies. (V. Co. Rep., 125.)

At common law, as well as by statute, there are two remedies: one by indictment, and the other by action for damages. The common law regarded the offense as a breach of the peace, by provoking the person libeled to break it, and this whether the matter published were true or not. But in the action for damages the truth of the matter might be pleaded in justification, and now in the United States and England the truth is a good defense to an indictment, if published with good motives and for justifiable ends. (Cooley's Bl. Com. III., 125-6 note.)

Sec. 261. SAME SUBJECT—MALICIOUS PROSECUTION.—“A third way of destroying or injuring a man's reputation is by preferring malicious indictments or prosecutions against him, which, under the mask of justice and public spirit, are sometimes made the engines of private spite and enmity.” (III. Bl. Com., 126.) The common law remedies were the securing for the injured party damages by an action of conspiracy, or malicious prosecution. The action of conspiracy could only be brought against two or more, and the action on the case for malicious prosecution is the more usual remedy.

To entitle a person to damages for being maliciously prosecuted, either criminally or civilly, the following circumstances must occur: 1, Falsehood in the charge

or demand, indicated by the acquittal or discharge of the accused; 2, want of probable cause for instituting it, which is a mixed question of law and fact; 3, malice in the prosecutor, but this need not be proven by positive evidence in all cases; it may be established by inference, or implied from the want of probable cause; 4, damage to the accused party, resulting from arrest or imprisonment, from scandal, and from expense. (Cooley's Bl. Com. III., 126n.)

The action does not lie in respect of a civil suit maliciously instituted, unless in case of some unnecessary step being taken, as an arrest, attachment, or commencing a proceeding in bankruptcy (*idem*).

Sec. 262. RIGHT TO PERSONAL SECURITY EXTENDS FOR LIFE UNLESS FORFEITED.—

The right for personal security can only be terminated by the death of the person, except in those cases where it is forfeited in whole or in part for the breach of those laws which are enforced by the sanction of capital punishment. And in this regard Blackstone observes, "that whenever the constitution of a State vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subject, such constitution is in the highest degree tyrannical; and that, whenever any laws direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may, by prudent caution, provide against it." The provisions of State and National con-

stitutions and bills of rights are to protect the subject from this arbitrary and unnecessary forfeiture of rights.*

II. Personal Liberty.

Sec. 263. MEANING OF PERSONAL LIBERTY.—“Personal Liberty,” in the words of Blackstone, “consists in the power of locomotion, of changing situation, or moving one’s person to whatsoever place one’s own inclination may direct, without imprisonment or restraint, unless by due course of law.” (I. Bl. Com., 134.)

The same author observes that it is a right strictly natural, and the laws should never abridge it without sufficient cause. The laws of England and the United States prevent one’s personal liberty being abridged at the mere discretion of an individual or magistrate, and prescribe the causes for which and the method in which such restraints are to be exercised. Magna Charta, the first great check upon magisterial license, provides that no freeman shall be taken or imprisoned but by the lawful judgment of his equals, or by the law of the land.** And subsequent statutes and charters in England increase the restraints upon arbi-

*I. Bl. Com., 133.

**The words “law of the land” and “due process of law” are employed interchangeably in law, and mean the same thing. They have sometimes been supposed to be equivalent to “the judgment of his peers,” but this is an error, and they are applicable to a great variety of cases in which trial by jury is not permissible. “The meaning is that every citizen shall hold his life, liberty, property and immunities under the protection of general rules which govern society.” (Webster, in Dart-

trary power, and further protect the individual in his personal liberty. The Habeas Corpus Act passed in the thirty-first year of Charles II. (1679), so plainly pointed out and enforced the provisions of a former act of Charles I., providing a method of determining the legality and justice of a commitment, that no person can be detained in prison except by the sanction of the law. (I. Bl. Com., 135.)

Sec. 264. IMPORTANCE OF THE PROTECTION OF PERSONAL LIBERTY.—The preservation of personal liberty is of the highest importance, as without it there would soon be an end of all other rights and immunities. As Blackstone reasons, to take a man's life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism as to alarm the people, but confinement of the person by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is less public and striking and hence a more dangerous instrument of arbitrary government. The limited suspension by the authority of parliament of the habeas corpus act, in times of public peril, Blackstone justifies on the ground that "the nation parts with its liberty for awhile, in order to preserve it forever." (I. Bl. Com., 136.)

mouth College vs. Woodward, 4 Wheat., 519.) Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law sanction and require, and under such safe-guards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.— See Cooley's Bl. Com. I., 135n.

Sec. 265. PROTECTION TO PERSONAL LIBERTY AT COMMON LAW.—The common law aimed to protect the subject against all unlawful imprisonment or restraint. And the remedies given were the writ of habeas corpus to get released from imprisonment, and an action sounding in damages for false imprisonment.

“The confinement of the person, in any wise, is an imprisonment; so that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. And the law so much discourages unlawful confinement that if a man is under duress of imprisonment, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may allege this duress, and avoid the extorted bond. . . . To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into, if necessary, upon a habeas corpus. If there be no cause expressed, the gaoler is not bound to detain the prisoner.” (I. Bl. Com., 136-7.)

A natural consequence of this personal liberty, says Blackstone, is that every Englishman may claim a right to abide in his own country so long as he pleases, unless driven from it by sentence of law. Exile and transportation being unknown to the common law, no power, save parliament, can send a subject out of the

land against his will. The king himself could not send any man out of the realm, even upon the public service, excepting sailors and soldiers, or compel him to become a foreign ambassador. See I. Bl. Com., 137-8.

Sec. 266. SAME SUBJECT—HABEAS CORPUS.—Two points are requisite to constitute the injury of false imprisonment: 1, The detention of the person, and, 2, the unlawfulness of such detention. And we have seen in the preceding section that the common law gives two remedies, the one by habeas corpus to remove the injury, the other by an action for false imprisonment giving satisfaction in damages.

The writ of habeas corpus, which Blackstone justly describes as the most celebrated writ in English law, was made use of in various forms by the early English courts at Westminster, and was denominated according to the purpose for which the prisoner was removed from one court to another. But the form that came to be used as the great and efficacious writ for the testing of all sorts of illegal confinements, is that of "habeas corpus ad subjiciendum," directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. This was a high prerogative writ issuing out of the court of king's bench, both in term time and in vacation, by an order from the chief justice or any other of the judges, and running into all parts of the kingdom, commanding the production

of the person detained. The writ was returnable to the court or judge awarding it, and was decided by him.* (III. Bl. Com., 128-31.)

Many pitiful evasions and abuses of the manifest purpose of this writ by mercenary courts and judges led to the passing of remedial and enlarging statutes, the most important of which, called the Habeas Corpus Act (31 Car. II., c. 2), defines the methods of securing and limits the time of the return of the writ, and so clearly points out the duty of the courts or judges, and specifies which of them shall issue the writ, that it has ever since been a most effectual and powerful instrument to check arbitrary imprisonments and secure the personal liberty of the individual. See III. Bl. Com., 133-8.

Sec. 267. SAME SUBJECT—FALSE IMPRISONMENT.—The “satisfactory” remedy for the injury of false imprisonment is by an action of trespass by force and arms, usually called an action for false imprisonment, wherein the party recovers damages for the injuries he has received.**

Sec. 268. PROTECTION OF PERSONAL LIBERTY IN THE UNITED STATES.—By the Dec-

*The writ of habeas corpus, whether at common law or under 31 Car. II., Ch. 2, does not issue as a matter of course upon application in the first instance, but must be grounded on an affidavit, upon which the court are to exercise their discretion whether the writ shall issue or not. (Cooley's Bl. Com., III., 132n.)

**III. Bl. Com., 138. See I. Hill of Torts, 231. Addison on Torts, Ch. 12.

laration of Independence, which may be regarded as our Magna Charta, it is declared "that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed." And this admission of fundamental rights is incorporated in various State constitutions in almost identical language. But neither the National nor State constitutions stop at declaring the equality of citizens and specifying general rights; they proceed to deny certain powers to their governments and to establish safeguards to protect the declared rights of mankind.

A well-known and capable author considers under the following heads the securities which protect the personal liberty of the individual: 1, Equality; 2, Corporal Liberty; 3, Religious Liberty; 4, Liberty of Speech and of the Press.* This arrangement we shall follow, and discuss briefly such liberty of conduct, choice and action as the law gives and protects.

Sec. 269. SAME SUBJECT—EQUALITY.—The language of constitutions declaring the equality of men is not construed to mean that all men are absolutely equal in every respect, or that government should secure them exact conditions, opportunities, occupations, or properties. Judge Walker thus states the true meaning to be "that equality of civil and po-

*Walker's American Law, 193.

litical rights is the birthright of all men." (Am. Law, 192.) And Judge Cooley states, "that all men are equal before the law in rights, privileges, and legal capacities. Every person, however low, or degraded, or poor, is entitled to have his rights tested by the same general laws which govern others." (Cooley, Principles, 3d ed., 247.)

The chief provision designed to secure political equality is that of the Federal constitution, which prohibits both the United States and the individual States from conferring, and all citizens from receiving, titles of nobility, or other hereditary distinction. So the Fourteenth Amendment is designed to protect primarily the emancipated slave in his rights as a free-man, and to prevent discriminations against him on account of his color. (Slaughter House Cases, 16 Wall., 36.)*

A further limitation to this doctrine of equality is, that it only requires that the laws shall not exclude any persons coming within the principle of their operation, so corporations with special privileges are not unconstitutional if their charters exclude no class of persons from becoming members. But everything in the shape of a monopoly is prohibited by the spirit,

* "It is in vain that Blackstone and others insist 'that the distinctions of rank and honors is necessary in every well-governed state:' for experience proves that men will of themselves create all the distinctions required, without the aid of government, to perpetuate them in the blood. . . . We acknowledge no nobility but that which nature gives, and no distinctions but those which men themselves achieve." (Walker, Am. Law., 192.)

if not the letter of the constitution. (Walker, Am. Law, 193; II. Pet., 420.)

Sec. 270. SAME SUBJECT—CORPORAL LIBERTY.—Corporal liberty is described under our government, as the liberty to go wherever, or do whatever, one chooses, provided one does not interfere with the rights of others. Here we see that corporal liberty is but natural liberty so far restrained as is necessary for the general advantage.

Prof. Walker observes that individuals may be deprived of corporal liberty in three classes of cases: 1, By arrest in civil cases; 2, by arrest in criminal cases; 3, by standing toward another in the relation of subjection. Let us notice briefly each of these cases.

1. Arrest in Civil Cases. The common law which permitted arrest for debt has been modified by statute in all of the States of the Union. Where statutes provide for arrest for fraud or misrepresentation, a method is provided by which the debtor, by surrendering up his property, or, if he has not more than is exempt, may be discharged under the insolvency laws.

2. Arrest in Criminal Cases. When an individual commits a crime, thereby infringing the personal security of others, he forfeits for a period his corporal liberty. This forfeiture is the will of society, and is for the good of every member of society. The period of the forfeiture is graduated according to the gravity of the offense, which, being known to all, does not come in the way of a surprise to the offender. But that no person may thus be deprived of his liberty unjustly or

arbitrarily at the instance of some person in authority, numerous safeguards surround a person charged with the commission of a crime, and in every instance he is presumed innocent until pronounced guilty upon a fair and impartial trial by a jury of his fellowmen.

Briefly, the protection afforded persons arrested for crime, and specified in the Federal and State constitutions, are: Against unreasonable searches and seizures; admission to bail; specifying the mode of accusation, as by presentment or indictment by a grand jury; upon trial the accused is to be heard by himself and his counsel; may demand the nature of the charge and have a copy of the same; allowed to meet the witnesses face to face; to have compulsory process to obtain witnesses in his favor; is given a speedy and public trial by an impartial jury of the county or district in which the offense was committed; is not compelled to give evidence against himself, and is not to be twice put in jeopardy for the same offense. See No. 2, Home Law School Series, Ch. ix.; Walker, Am. Law, 194-8.

3. Persons in Subjection. The most common instance of a person in subjection and liable to domestic detention was formerly that of a slave to his master. But slavery has been abolished, and domestic detention only arises from the relation of a minor to his parent or guardian, an insane person to his guardian, etc., which will be discussed more appropriately under the subject of Domestic Relations.

The personal liberty of the individual is secure unless restrained in the above-mentioned ways, and any personal detention contrary to these provisions is un-

lawful, whether it be in the public streets, in prisons, in private houses, or elsewhere. The remedy for a person thus unlawfully detained is, first, by habeas corpus to regain his liberty, and, second, by an action for malicious prosecution or false imprisonment to recover damages. The habeas corpus act of 31 Car. II., c. 2, has been re-enacted in the United States with but slight change, and both Federal and State constitutions provide that "the privilege of the writ of habeas corpus shall not be suspended, unless when, in case of rebellion or invasion, the public safety may require it." (Walker, Am. Law; Sec. 78). See No. 2, Home Law School Series, Sec. 166.

Sec. 271. SAME SUBJECT—RELIGIOUS LIBERTY.—The Federal constitution declares that "no religious test shall ever be required as a qualification to any office or public trust under the United States." (Art. vi., cl. 3.) And the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." These provisions are not applicable to the State governments, but the State constitutions contain securities, and the Fourteenth Amendment probably protects the citizen from arbitrary State action. These provisions prevent the establishment of a state church, and guarantee the perpetual divorce of spiritual and temporal affairs.

The State constitutions in protecting religious liberty pursue a course of toleration and thus establish religious equality. All forms of religion are equally

respected by the law and permitted to flourish so long as their practices do not become oppressive, or inimical to public morals or justice. The individual cannot be compelled to support or attend religious worship; is permitted to express his religious opinions, and to worship according to the dictates of his own conscience.*

Sec. 272. SAME SUBJECT—LIBERTY OF SPEECH AND OF THE PRESS.—The Federal constitution provides that "Congress shall make no law abridging the freedom of speech or of the press."**

*U. S. Const., Am. Art. 1.

**See II. ent. Com., 34: "All men have a natural and in-defeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent, and no preference shall be given, by law, to any religious society, nor shall any interference with the rights of conscience be permitted." (Const. Ohio, 1851, Art. 1, Sec. 7.)

Blasphemy, etc. Judge Cooley remarks in his *Principles*, 3d ed., p. 226, "that the courts of the Union and of the States, in administering the common law, find it necessary to take notice that the prevailing religion of the country is Christian, and that because of that fact certain conduct may constitute a breach of public decorum, and therefore be illegal, though it might not be where a different religion prevailed. The law of blasphemy depends largely for its definition and application upon the generally accepted religious beliefs of the people. and in the law of contracts many provisions might be found to be illegal in a Christian country which would be enforced where the Mohammedan or some other form of religion prevailed. . . . But even the law of blasphemy must be administered as to preserve liberty of discussion and argument upon the most vital points." (*People vs. Ruggles*, VIII. John. N. Y., 290.)

State constitutions recognize this liberty, but hold individuals responsible for its abuse.* From which Judge Walker concludes: "The doctrine then, is, that the liberty of speech and of the press consists in freedom from previous censorship or restraint, and not in exemption from subsequent liability for the injury which may thereby be done. And, accordingly, the law makes provision by which the person injured may have his civil action of slander or libel, to recover damage done to his reputation; and by which the libeler may be criminally prosecuted as an offender against the public peace." (American Law, Sec. 80.)

But Judge Cooley, observing that censorship had never been practiced in the Colonies, believes that the First Amendment aimed at laws impairing or restricting the rights as well as denying censorship, and concludes: "The freedom of the press may therefore be defined to be the liberty to utter and publish whatever the citizen may choose, and to be protected against legal censure and punishment in so doing, provided the publication is not so far injurious to public morals or to private reputation as to be condemned by the common law standards, by which defamatory pub-

* "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of the right, and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted." (Const. Ohio, 1851, Art. 1, Sec. 11.)

lications were judged when this freedom was thus made a constitutional right. And freedom of speech corresponds to this in the protection it gives to oral publications." (Principles, 3d ed., 302; Const. Lim., 6th ed., 518.)

The Federal constitution extends an absolute privilege to members of Congress "for any speech or debate in either house." (Const., Art 1, Sec. 6.) And public policy protects a witness from a civil action for statements made in course of judicial proceedings, though he may be punished for perjury. (*Marsh v. Ellsworth*, 50 N. Y., 91.) So executive and judicial officers, as to their official utterances, incur no civil liability while acting within the limits of their jurisdiction. (Cooley, Torts, 2d ed., 250.) And attorneys in presenting a case to the jury are given the liberty of criticising freely the motives, actions and conduct of parties or witnesses if pertinent to the case and not for the mere purpose of detraction or abuse. (*Maulsby v. Reifsnyder*, 69 Md., 143.) See Cooley, Principles, 3d ed., 299-309.

III. Private Property.

Sec. 273. PROPERTY.—The third absolute right is that of property. According to Blackstone this consists in the free use, enjoyment, and disposal by a person of all his acquisitions, without any control or diminution, save only by the laws of the land. (I. Bl. Com., 138.)

The same author suggests that the origin of private property is probably founded in nature, but that the

modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society; and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty.*

* I. Bl. Com., 138. In the second book of his commentaries Blackstone thus comments on private property: "Pleased as we are with the possession we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favor, without examining the reason or authority upon which those laws have been built. We think it enough that our title has been derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner, not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land; why the son should have the right to exclude his fellow creatures from a determinate spot of ground, because his father had done so before him, or why the occupier of a particular field or of a jewel, when lying on his death-bed, and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them."—II. Bl. Com., 2.

Verily, there is nothing new under the sun! Thomas Jefferson was but reiterating Blackstone when he said the world belongs to the living. The reformers of our day are simply asking, in pertinent manner, the questions which the lawyers and statesmen of the past touched upon, but were too timid of tyrannical rulers to bring to the front. "The mass of mankind are to obey the laws, and not scrutinize too nicely the reasons of them." Is this not the maxim of the money kings and their educated tools? An inquiry into the reason of

Sec. 274. PROTECTION TO PROPERTY AT COMMON LAW.—The common law is extremely watchful in ascertaining and protecting the right to property. Magna Charta declared that no freeman shall be dispossessed, or divested, of his freehold, of his liberties, or free customs but by the judgment of his peers, or by the law of the land. And this declaration was enforced by many subsequent statutes to prevent the king from seizing to his own use the goods and properties of the subject. So great is the regard of the law for private property, observes Blackstone, that it will not authorize the least violation of it, even for the general good. So a road through private grounds could not be constructed without the consent of the owner, though it would be beneficial to the public. But the legislature, and it alone, could compel the individual to acquiesce in the taking of his property for public uses upon compensation being given for the injury sustained. The legislature obliges the individual to sell his possessions to the public use for a reasonable price. (1. Bl. Com., 139.)

unjust laws is always troublesome, and reformers are at best but meddling fellows! Vested rights, however unjust, create no trouble as long as the persons injured submit tamely. Only when some leader, some Wat Tyler, Cromwell, or Lincoln begins to reason, and the masses awake to a sense of their wrongs through these same vested rights, does the storm come. As a result of the investigation better conditions arise, and a new civilization is born. Let the masses always scrutinize the reason and spirit of the laws and civilization will keep pace step by step with the development of human justice, and not lag a century or two behind, and have to catch up by the drastic means of revolutions and civil wars.

So in the matter of taxes, protection to private property was found in the well-guarded principle, confirmed by many charters and statutes, that no subject could be constrained to pay any aids or taxes, even for the defense of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament.*

Sec. 275. PROTECTION TO PROPERTY IN THE UNITED STATES.—The Federal constitution, in the Fifth Amendment, provides that no person shall be deprived of property without due process of law, nor shall private property be taken for public use without just compensation. And this restraint is extended to the State governments by the Fourteenth Amendment. The State constitutions likewise contain provisions protecting property rights.**

Property is that which is recognized as such by law. In America the law which determines what is property

* I. Bl. Com., 140. Under the subjects, "Personal Property and Real Property," in succeeding numbers of this series will be given a description of the various remedies given for a violation of property rights.

** "Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure, or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money, and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner." (Const. Ohio, Art. 1, Sec. 19.)

is for the most part the common or customary law, to which the statutes make some additions. The protection of due process of law applies to acts of governmental officers as well as those of private citizens. Executive, ministerial and judicial officers must act within the scope and authority of the power vested in them by law or their acts will not be by due process of law. (Cooley, Principles, 3d ad., 346-7.)

Sec. 276. SAME SUBJECT—THE EMINENT DOMAIN.—Both Federal and State constitutions recognize that the private right of an individual to specific property must yield to the eminent domain of government, whenever the public good requires it. But to avoid hardships and equalize the burden the owner of the property so taken is given a compensation, which by statute is usually required to be full, just, and in money.*

This power of eminent domain Judge Cooley defines "as the lawful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience, or welfare may demand." (Principles, p. 363.) This power is exercisable by either the Federal or State government, according to the needs of government. In the exercise of powers conferred by the Constitution the Federal government may con-

*Walker, Am. Law, Sec. 81; in re Wells County Road, 7 O. St., 21; Cooley's Bl. Com., I., 140n.

struct piers, fortresses, lighthouses, public buildings, military roads, etc., and condemn land for same. The States may provide highways, and take land for other State and municipal purposes, the limitation being, that it be taken for a public purpose, and within the sphere of the government providing for it. (Cooley, Prin., 366; *U. S. v. Gettysburg Elec. Ry. Co.*, 160, U. S., 688; *Monongahela Nav. Co. v. United States*, 148 U. S., 312.)

Sec. 277. SAME SUBJECT—CONTRACTS.—The provisions of the fundamental law aim to protect property in expectancy as well as in possession. Thus contracts, which are the chief species of property in expectation, are not to be impaired, when made, by any future State action. See No. 2, Home Law School Series, Sec. 172.

Sec. 278. SUBORDINATE RIGHTS MENTIONED BY BLACKSTONE.—In addition to the three great primary rights of personal security, personal liberty and private property, Blackstone observes that the constitution of England has established certain other auxiliary subordinate rights of the subject, which serve as outworks to protect and maintain inviolate the others, and does not suffer their enjoyment to depend upon the dead letter of the laws. These are:

1. The constitution, powers and privileges of parliament, which keep the legislative power in due health and vigor, and prevent the enactment of laws destructive of general liberty.

2. The limitation of the king's prerogative, by bounds so certain and notorious that it is impossible that he should either mistake or exceed them without the consent of the people.

3. The right of applying to the courts of justice for redress of injuries. "Every subject," according to Coke, "for injury done to him in bonis, in terris, vel persona, by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the due course of law, and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay." (II. Inst., 55.)

4. For any uncommon injury or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances.

5. The fifth and last auxiliary right of the subject, is, that of having arms for their defense, suitable to their condition and degree, and such as are allowed by law. Which is a public allowance of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression. (I. Bl. Com., 141-144.)

Sec. 279. ADDITIONAL SECURITIES TO ABSOLUTE RIGHTS IN THE UNITED STATES.—Our laws and institutions being largely borrowed from

or copied after those of England, afford the citizen the same protections above specified by Blackstone. True, we have no king whose prerogative must be so nicely bounded. But our constitutions prescribe the nature and extent of the executive and legislative power, and check in a number of ways, the arbitrary action of either. The courts are likewise open to every individual, and seek to afford a fitting remedy for every species of injury.*

The First Amendment to the Federal constitution makes inviolate by Congress the right to peaceably assemble and petition for a redress of grievances. State constitutions also protect this right as that of instructing representatives. (Ohio Const., Art. 1, Sec. 3.)

The right to bear arms is also protected by Federal and State constitutions, and the Declaration, as we have seen, as well as some State constitutions, proclaim the right of the people to alter, reform, or abolish government whenever they may deem it necessary. (U. S. Const., 2d Amendment; Ohio Const., Art 1, Secs. 2-4.)

Sec. 280. SAME SUBJECT—THE RIGHT TO WORK.—As noticed in an earlier section, absolute rights, though founded in nature, are dependent upon human laws for their recognition, and this recognition is developmental rather than institutional. We now secure to some extent the right of education by the com-

* "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and justice administered without denial or delay." Const. Ohio, Art. 1, Sec. 16.)

mon school system, supported by income from public lands and general taxation. We protect various sorts of intangible property, as patents and copyrights. We secure property rights to married women. We have abolished imprisonment for debt. We recognize the claims of the poor, the crippled, the blind and the insane, to support and care from the able portion of the public. Are not these proof positive of a developing humanity and brotherhood which demands of civilization an addition to the sum total of absolute rights? A further right is now being demanded, it is the right to work.

Under the head of "employment" Judge Cooley says, "Every person has a right to choose his own employment, and devote his labor to any calling, or at his option to hire it out in the service of others. This is one of the first and highest of all civil rights. . . . The right to reside in a country implies the right to labor there." (Principles, 3d ed., 255-6.) But suppose there is no occupation or employment to choose from! And no one who desires to hire your services! This is the condition which confronts those who are now demanding the right to work. The competitive system, through the instrumentality of machinery, can, and does, produce enough to supply the wants of all without demanding the services of all. Those not employed are owners or tramps. The owner, or employer, maintains his status by controlling employment and taxing the laborer for the privilege of working; when the worker objects to the tax levied by

the employer, the privilege is denied him, and he is at liberty to join the army of tramps or commit suicide.*

The solution of the industrial problem, we believe, lies in the recognition of the right to work. But granting the right to work means that the State shall employ the unemployed, and this in turn means public ownership. Labor is property but one remove, and is entitled to protection as property. With labor as a precarious privilege, capable of being denied at the caprice of an overbearing plutocratic class, the liberties of the masses will become but an empty name.

* "It is admitted by all thoughtful people that a social system based on competition has failed to provide a plan whereby all who are willing to work may work and live, and the consequence is that in our country to-day there is an ever-increasing army bearing the 'curse of the wandering foot.' . . . Turgot said: 'God, by giving man wants, and making his recourse to work necessary to supply them, has made the right to work the property of every man, and this property right is the first and most sacred right of all.' . . . The right to work! This is the right that must be established and for which we need a new Emancipation Proclamation." (From speech by Mayor S. M. Jones, of Toledo, at Cincinnati, May 19, 1899.)

(End of Personal Rights.)

THE DOMESTIC RELATIONS.

INTRODUCTORY.

Sec. 281. MEANING AND SCOPE OF THE DOMESTIC RELATIONS.—The word “domestic” signifies home or household affairs, including the family and servants, and distinguishes the subject of Domestic Relations from the other public or private relations of individuals which do not so particularly concern the home. As treated by the leading text-writers the subject embraces these topics: 1. Husband and Wife; 2. Parent and Child; 3. Guardian and Ward. 4. Infancy; 5. Master and Servant.

A number of writers do not make a separate topic of infancy, but the development of many new principles pertaining as well to guardian and ward as to parent and child make a new heading under which these principles can be treated desirable.*

Sec. 282. AUTHORITIES.—The authors who have written treatises upon the topics now generally known as the domestic relations have not uniformly entitled their productions as works upon the domestic relations, and this fact is to be kept in mind by the student. Among the most available sources of infor-

*Schouler, Dom. Rel., Sec. 1.

mation upon the subject we note the following for the convenience of the student: I. Blackstone's Commentaries, 422-466; II. Kent's Commentaries, Lectures, 26-32; Reeve's Domestic Relations; Schouler's Domestic Relations; Bingham's Infancy and Coverture; Browne's Domestic Relations; Bishop's Marriage, Divorce and Separation; Schouler's Husband and Wife; Wood's Master and Servant; Field's Law of Infants. Reference will be made in the present treatise to these authorities, and to such leading cases as best express the general doctrine upon these various topics. Where possible the students should read the cases and examine such of the above authorities as may be accessible.

PART I.

HUSBAND AND WIFE.

CHAPTER I.

OF THE CREATION OF THE MARITAL RELATION.

Sec. 283. MARRIAGE DEFINED.—Marriage is sometimes spoken of as a contract, made in due form of law, by which a man and a woman reciprocally engage to live with each other during their joint lives, and to discharge toward each other the duties imposed by law on the relation of husband and wife.*

Our law, says Blackstone, considers marriage in no other light than as a civil contract. It treats an unlawful marriage not as a sin, but merely as a civil inconvenience. The law treats marriage as it does all other contracts, allowing it to be good and valid in all cases where the parties at the time of making it were, first, willing to contract; secondly, able to contract, and, third, did contract, with the proper forms and solemnities required by law. (I. Com., 433.)

Sec. 284. NATURE OF THE CONTRACT.—Though marriage is considered as a civil contract, it has some incidents which make of it a particular species of contract, or, rather, a “domestic relation resulting from contract.” Thus the promise to marry is not within the statute of frauds, and need not be stamped when in writing. No bill in equity or other proceeding

*Bouv. Law Dic., “Marriage;” Schoul. Dom. Rel., Sec. 12.

lies to compel the specific performance of the promise, though damages may be recovered for the breach. So contracts in restraint of marriage and in procuration of marriage are void, as against the policy of the law. The relation, though formed by mutual consent, cannot be thus dissevered; parties once married can only be separated by death, or a solemn divorce granted by the general or special ordinance of the legislature. The capacity of the contracting parties is more carefully regulated than in other species of contracts.*

Sec. 285. THE EXECUTORY AGREEMENT TO MARRY.—The agreement to marry is quite distinct in its nature and consequences from that natural consent to present marriage which results in the marital status. It is a mere executory contract founded upon a consideration, which consideration in most cases is the mutual promises of the parties, and is governed largely by the same rules as other contracts. It differs from other contracts because the parties must be persons competent to enter into the contract of marriage and must act in good faith, and without deception or fraud. So ill conduct in one of the parties promised or engaged to marry, of a nature, and to a degree not quite definable, yet far less than would be

*Cooley's Bl. Com., I., 433n; Schoul. Dom. Rel., Sec. 13.

"Marriage is the union of one man and one woman so long as they shall both live, to the exclusion of all others, by an obligation which during that time the parties cannot, of their own volition and act, dissolve, but which can be dissolved only by authority of the state." (Perkins, J., in *Roche vs. Washington*, 19 Ind., 57.)

required for a divorce after marriage, will justify the other in breaking the contract.*

The contract to marry must be mutual, that is, there must have been an intention to enter into an agreement, as by an offer and acceptance. But this contract may be proven from the circumstances usually attending an engagement, and the acceptance may be implied. The contract is not within the statute of frauds, and is valid though not to be performed within a year. Mutual promises are sufficient consideration, but a contract founded upon an immoral consideration would be void. This contract, when properly made between capable parties, is binding, and either party has an action for damages against the party refusing to carry out the contract.**

Sec. 286. SAME SUBJECT—BREACH OF PROMISE.—The well-known and much-abused action of breach of promise results from the failure of one of the parties to fulfill the executory agreement to marry. The action is sustainable by a man against a woman, but it is usually the woman that asks this pecuniary consolation. (1 Salk., 24; 5 Mod., 511.)

The party ready to perform may request performance, and offer to perform the contract before bringing the action. But this is not necessary on the part of the woman if a time has been fixed for carrying out

*The contract to marry is the mutual agreement of a man and woman to become husband and wife. It precedes marriage, is not a part of the marriage, and has no effect upon its validity. (Bishop, Mar. & Div., Sec. 82)

**4 Mo. App., 99; 53 Mass., 25; Cooley, Bl. Com., I., 433n, and cases there cited. Wetmore vs. Mell, 1. Ohio St., 26.

the agreement, or a reasonable time has elapsed since the mutual promises, and she is ready and willing. (64 Ind., 567; *Turner v. Baskin*, 2 West. L. M., 98; 11 Ala., 35.) The fact that the party in default is incapable of carrying out the agreement, as where already married, is no defense, if the plaintiff was ignorant of that fact when the promise was made (106 Mass., 339). And the injured party may sue at once without waiting for the time of performance, or make any offer or demand. (27 Mich., 217.) But where the incapacity to perform the agreement is known to both parties before the making of the agreement, neither party is actionable. (63 Ill., 99.) So where both parties are ignorant of the incapacity, or it arises, without fault, after the agreement, as mental incapacity, the contract is void. (*Chitty on Cont.*, 795.)

Sec. 287. SAME SUBJECT—EXCUSING THE BREACH OF CONTRACT.—If a man promises to marry a woman, having reason to suppose the intended is chaste, and she encourages him so to believe, when in reality she is not, it is such a fraud as will justify a refusal to perform the contract. (3 Bing. (N. C.) 54; 112 Pa. St., 44.)

If parties release each other from the engagement neither can bring an action for breach of promise. (100 Mass., 358.) So a cessation of intercourse and correspondence may evidence such release.

When the action is maintainable the plaintiff is entitled to damages for the mental suffering, mortification and pain resulting from the defendant's failure to

perform, also to punitive damages in case of seduction. (57 Tex., 215.) Infancy of the defendant at the time the promise was made is a good defense. (*Rush v. Wick*, 31 O. St., 521.)

Sec. 288. VOID AND VOIDABLE MARRIAGES.—The words void and voidable are frequently used in relation to marriages, and it is important to understand at the outset the distinction in effects and consequences between a void and voidable marriage. A void marriage is a mere nullity, and its validity may be impeached in any court, directly or collaterally, and whether the parties be living or dead. A voidable marriage is valid for all civil purposes until a competent tribunal has pronounced the sentence of nullity, upon direct proceedings instituted for the purpose of setting the marriage aside. Voidable marriages once set aside are treated as void from the beginning (*ab initio*), and are no more protection to the parties or their issue than void marriages; but such suit of nullity must have been concluded in the lifetime of both parties, or it will fail, and the union be treated as lawful from its inception. Modern statutes tend to treat defective marriages as voidable rather than void, and further to modify the doctrine that a sentence of nullity makes a voidable marriage void from the beginning.*

Sec. 289. ELEMENTS ESSENTIAL TO A VALID MARRIAGE.—To constitute a perfect mar-

*Schoul Dom. Rel., Sec. 14; Stimson, Am. Stat. Law, Sec. 6116.

riage, "the contracting parties should be two persons of the opposite sex, without disqualification of blood or condition, both mentally competent and physically fit to discharge the duties of the relation, neither of them being bound by a previous nuptial tie, neither of them withholding a free assent; and the expression of their mutual assent should be substantially in accordance with the prescribed forms of law." (Schoul., Dom. Rel., Sec. 15.)

These being the essentials of marriage, we shall speak, in turn, as does Schouler, of each of the following topics: 1. Relationship as a disqualification; 2. Civil or social condition; 3. Mental capacity; 4. Physical capacity; 5. Proper age; 6. Prior marriage; 7. Force, fraud and error; 8. Proper celebration of the marriage as prescribed by law.

Sec. 290. RELATIONSHIP AS A DISQUALIFICATION.—Relationship is either by consanguinity or affinity. Consanguinity is blood relationship, or the connection imputed to persons having a common ancestor. Affinity is a relationship resulting from marriage, as between the husband and the blood relations of the wife, or between the wife and the blood relations of the husband.*

Marriages between near relatives have quite generally been forbidden among civilized nations as unclean and incestuous. Such marriages are also forbidden by the Mosaic law. There can be little doubt but that

*2 Bl. Com., 202-6; Abbott's Law Dict., "Consanguinity" and "Affinity."

such prohibitions are well-grounded in reason, and necessary to protect public morals and health, the difficulty arises in fixing a reasonable limit to the prohibition, and in deciding whether relationship by affinity as well as by consanguinity shall disqualify. Ecclesiastical courts at one time in England extended the prohibitions to the seventh canonical degree; which restraint became so intolerable as to demand a statutory modification. (32 Hen. VIII., c. 38.) This statute, which is still essentially in force in England and America, prohibits all marriages nearer than first cousins, and reduces the prohibitions to the third degree of the civil reckoning, ascending or descending. The prohibitions of this statute extend to illegitimate children, and to half-blood relations. The principles of this statute are recognized in the United States, but have been re-enacted in State statutes, and modified to some extent. Thus marriage between uncle and niece, or between aunt and nephew, are forbidden in some States. (*Harrison v. State*, 22 Md., 468.) And in Ohio, Indiana, Nevada and Illinois persons more nearly related than second cousins may not marry.* (Rev. Stat., Ohio, Sec. 6384; Stimson Am. Stat. Law, Sec. 6111.)

The English law regards affinity as an impediment equally with consanguinity, and enforces the rule though the marriage constituting the relation has ended by death or divorce. So in England a man may not

**Schoul. Dom. Rel., Sec. 16; I. Bish. Mar. & Div., 5 ed., Secs. 315, 317.

marry his deceased wife's sister, but this rule has never obtained in the United States. (*Blodget v. Brinsmaid*, 9 Vt., 27.) But by statute in the various States, affinity as applied in a lineal direction constitutes a bar to marriage, thus a man may not marry his father's widow, nor a woman her husband's son. And a man may not marry a son's widow and conversely.

Marriages within the prohibited degrees are considered void in some States, in others parties sue for a decree of nullity. At common law the issue of such marriages are illegitimate. (*Harrison v. State*, 22 Md., 468; 2 Kent, Com., 83-4.)

Sec. 291. CIVIL OR SOCIAL POSITION AS A DISQUALIFICATION.—At common law neither race, color or social position was an impediment to marriage. While social position, religion, etc., are no bar to marriage in the United States, yet by statutes in some States marriages between different races are forbidden, as between a black and a white, a white and an Indian, or a white and a Chinese. Such marriages are called miscegenation (mixing races) and are punishable in the States forbidding them. Such legislation is not contrary to the Federal constitution. (*Browne, Dom. Rel.*, 3; *State v. Gibson*, 36 Ind., 389; *Pace v. State*, 106 U. S., 583; *State v. Jackson*, 80 Mo., 175.)

Sec. 292. MENTAL CAPACITY.—The marriage relation is founded upon the consent of the parties, and this consent cannot be given by one incapable of appreciating the nature of the relation. (*Turner v. Mey-*

ers, 1 Hag. Con., 414.) No one can contract a valid marriage unless capable at the time of giving an intelligent consent; hence the marriages of idiots, lunatics, and all others who have not the use of their understanding at the time of the union are treated as void (Schouler, D. Rel., Sec. 18.)

Every case of mental incapacity stands on its own merits, and so far as a test can be provided it is, that the party must have sufficient intelligence to understand the nature of the marriage contract, and to perform the duties and responsibilities it creates. (Ward v. Dulaney, 23 Miss., 410; Atkinson v. Medford, 46 Me., 510.) So mere weakness of mind, or eccentricities of conduct are not sufficient to invalidate the marriage. (Smith v. Smith, 47 Miss., 211.)

The disability must have existed before the time of the ceremony, and have been unknown to the party contracting. Insanity accruing after marriage is not a cause for divorce, and nothing which is a consequence of it can be. (Powell v. Powell, 18 Kans., 37; 82 Ind., 146; Nonemacher v. Nonemacher, 159 Pa. St., 634.)

Drunkenness, which is analogous to insanity, is treated as temporary insanity, and if at the time of the union, the party was in a state of delirium tremens, or unable to understand the act of marriage, such marriage is invalid. Deaf and dumb persons, formerly classed as idiots, may now marry. So deafness, blindness, etc., are not treated as incapacities, and a marriage during a lucid interval by a lunatic is valid, but

query, if a commission of lunacy remains unrevoked. (Schoul., Dom. Rel., Sec. 18.)

Mental incapacity generally renders the marriage void, and it may be impeached directly or collaterally, but by statute many States require a sentence of nullity, and treat the marriage as voidable only. So by statute, after sentence of nullity, the children may be declared the legitimate offspring of the party legally competent to marry. (2 Kent, Com., 76; 1 Bish., Mar. & Div., 5th ed., Secs. 136-142.)

Sec. 293. PHYSICAL CAPACITY.—Physical incapacity, or impotence, existing at the time of the marriage will render it invalid. (Powell v. Powell, 18 Kans., 371; Morrell v. Morrell, 24 N. Y. Supr., 324.)

By physical capacity is meant simply that the sexual organization of both parties shall be complete. So mere barrenness or incapacity of conception constitutes no legal incapacity; nor a physical defect which does not interfere with copulation; nor, indeed, any disability which is curable. (Schoul., Dom. Rel., Sec. 19; 1 Hag. Con., 523.) So if a man knowingly marries a woman past the child-bearing age, he cannot have the marriage annulled on the ground of impotence. To set aside a marriage on this ground the decree of a competent court should be invoked.

Sec. 294. PROPER AGE.—Infancy or non-age is presumed to affect the mental and physical capacity of parties, and hence is an impediment to a valid marriage. The common law fixed the marriageable age at fourteen for males, and twelve for females, and this

age was also regarded as the age of puberty. Our State statutes have variously determined this age, ranging from fourteen to eighteen for males, and twelve to sixteen for females. Marriages between persons who have attained these ages are valid, but if one or both of the parties are within such age, the marriage may be avoided by either party on reaching the statutory age. (1 Bishop, Mar. & Div., Sec. 149.)

But on reaching the required age, continued intercourse, or slight circumstances indicating the intention of the parties to ratify the marriage, will complete it, and no new ceremony is required. So the disaffirmance may be with or without judicial sentence. (Schoul., Dom. Rel., Sec. 20.) And false representations by the infant as to his age does not estop him from annulling. (*Eliot v. Eliot*, 81 Wis., 295.) The marriage is neither void nor voidable, strictly speaking, but inchoate and imperfect until either ratified or disaffirmed.

Sec. 295. PRIOR MARRIAGE UNDIS-
SOLVED DISQUALIFIES.—Where a valid marriage exists, a marriage contracted by either party to it is void. (2 Kent, Com., 79.) And the guilty party is subject to criminal prosecution for bigamy. (Rev. Stat. Ohio, Sec. 7018.) Polygamous or bigamous marriages are prohibited in all of the States, and, though tolerated in Utah, were never sanctioned. (*Reynolds v. U. S.*, 98 U. S., 145.)

To make the second marriage invalid the first must have been binding in all respects. (*Bruce v. Burke*, 2

Add. Ec., 471.) In the absence of statute, nothing but death or divorce dissolves the first marriage so as to enable the parties to marry again. The second marriage being void, the incidents of a valid marriage do not follow, and unless the statutes relieve, the children are illegitimate. (4 Bl. Com., 164; *Glass v. Glass*, 114 Mass., 363.) By statute, where the subsequent marriage is contracted in the erroneous belief that the other spouse is dead, the children may be declared legitimate, and the party relieved of the criminal consequences. (Schoul., Dom. Rel., Sec. 21; Stimson, Am. Stat. Law., Secs. 6112-6.)

Where State statutes prohibit the guilty party, though divorced, from marrying again for a limited time or during the life of the innocent spouse, a marriage within the State would be void, but it is held that a marriage contracted by the party without the State, though for the purpose of evading the prohibition, is valid (*Thorp v. Thorp*, 90 N. Y., 602); but otherwise where there is a specific statute to the contrary. (*Van Voorhis v. Brintnall*, 86 N. Y., 18).

Sec. 286. FORCE, FRAUD OR ERROR MAY INVALIDATE A MARRIAGE.—Force implies a physical constraint of the will; fraud, some deception changing the natural state of the will; and error, one or both of these factors influencing the person's free will. In each of these cases, there being no mutual consent, a marriage so brought about is invalid. (Schoul., Sec. 23.) What amount of force will invalidate depends upon the circumstances, and varies with the condition

and situation of the parties, the general rule being that an amount of force sufficient to overcome one's free will and inspire terror will render the marriage null. (Bish. Mar. & Div., Sec. 211; Harford v. Morris, 2 Hag. Con., 423; Lyndon v. Lyndon, 69 Ill., 43.) A person forced to marry while under an illegal arrest may avoid the marriage, but one who marries by the advice of magistrate while under arrest for bastardy, in order to escape prosecution or imprisonment, will be bound. (Jackson v. Winne, 7 Wend. (N. Y.), 47; Smith v. Smith, 51 Mich., 607; Bish. Mar. & Div., Sec. 212.)

It is said that fraud to vitiate a marriage must go to the very essence of the contract. So a fraud that would justify breaking the engagement to marry may not be sufficient to avoid the marriage. This relation involves too many interests to be disturbed for trifles. So, fraud concerning matters accidental in their nature, as character, fortune, temper, social position, and the like, not being essential to the marriage relation, will not affect the validity of the marriage.*

Though the woman is unchaste to the extent of a

*2 Kent Com., 77. "Caveat emptor is the harsh but necessary maxim of the law. Love, however indispensable in an esthetic sense, is by no means a legal essential to marriage; simply because it cannot be weighed in the scales of justice. So, too, all such matters are peculiarly within the knowledge of the parties themselves, and they are put upon reasonable inquiry." Schoul. Dom. Rel., Sec. 23. In Lewis vs. Lewis, 44 Minn., 124, it is held that concealment by a woman that she was a kleptomaniac was no fraud as to essentials. See Todd vs. Todd, 149 Pa. St., 60.

prostitute, and has represented herself chaste to her intended husband, yet it is not fraud that will avoid the marriage. (*Leavitt v. Leavitt*, 13 Mich., 452.) But where the woman was pregnant by another man at the time of marriage and concealed the fact, and soon after marriage was delivered of a child, the husband was allowed to to avoid the marriage. (*Reynolds v. Reynolds*, 3 Allen (Mass.), 605.) But see *Foss v. Foss*, 12 Allen, 26. Contra. *Long v. Long*, 77 N. C., 304.

When the party wronged by fraud or duress has learned of the fraud, or is freed from the constraint, he or she may disaffirm the marriage or by subsequent cohabitation affirm it. (*Scott v. Schufeldt*, 5 Paige (N. Y.), 43.)

Error to invalidate a marriage must reach the essentials, and one marrying a poor person believing the party to be rich is nevertheless bound. But where another individual is substituted for the one actually accepted, or a person is unwittingly entrapped into a marriage ceremony, such marriage may be repudiated. (*Bishop, Mar. & Div.*, Sec. 204; *Clark v. Field*, 13 Vt., 460; *McClurg v. Terry*, 21 N. J. Eq., 225.)

Sec. 297. PROPER CELEBRATION OF THE MARRIAGE.—By the common law, marriage being a civil contract founded upon the consent of the parties, no legal forms or religious solemnities were required, and no special mode of proof. (2 Kent. Com., 86-7.) Schouler thinks that hatred of Popish ceremony and ritualism, which treated marriage as a sacrament, accounts in part for the civil contract theory of marriage. (*Dom. Rel.*, Sec. 13.)

Hence at common law and in the absence of civil requirements a marriage might result without formalities, or at least other than those required of the parties as evidence of their assent to the marriage contract. (*Dyer v. Brannock*, 66 Mo., 391; *Hutchins v. Kimmell*, 31 Mich., 126.) Two ways are specified for giving this assent: First, "per verba de presenti," as I do take you for my wife, and, I do take you for my husband, with or without immediate cohabitation; second, "per verba de futuro, cum copula," as, I will take you for my wife or husband in the future, followed by cohabitation. In the latter case the copula is no part of the marriage, but may serve to some extent as evidence of it. (*Port v. Port*, 70 Ill., 484.)

Words of present agreement to become husband and wife, the assent being evidenced by certain formalities, and followed by sexual connection, create the marriage relation; first, by the law of nature (1 Hag. Con., 216); second, by the canonical law prior to the Council of Trent (*Dalrymple v. Dalrymple*, 2 Hag. Con., 54); third, by the English common law (*Queen v. Willis*, 10 C. & F., 534); fourth, by the decision of the United States Supreme Court (96 U. S., 76); fifth, by the law of sovereign States (*Hutchins v. Kimmel*, 31 Mich., 126).

In a few States it is held that mere verba de futuro, though followed by cohabitation, does not constitute a valid marriage.* (*Cheney v. Arnold*, 15 N. Y., 345;

*The words of promise must not only be uttered but also with matrimonial intent. So a betrothal followed by copu-

Peck v. Peck, 12 R. I., 485.) But as a rule nothing is necessary to create the status of marriage save the simple agreement of two marriageable persons to become husband and wife, the status being assumed at the time of the assent. (Bishop, Mar. & Div., Sec. 227.)

Sec. 298. SAME SUBJECT — STATUTORY FORMALITIES.—Though by the law of nature and reason there is no need of marriage formalities beyond the evidenced assent of the parties, yet by statute, formalities may be required and made necessary to a valid legal marriage. Peculiar forms and ceremonies have characterized marriages among all nations, and these, though as dissimilar as can be imagined, have tended to become religious in character. The ecclesiastics, who have had a controlling influence in many English laws, have from the first sought to strengthen their own influence by making this universal relation

lation does not make this informal marriage a legal one, in a case where the parties awaited a formal ceremony and did not agree to become husband and wife without it. (Peck vs. Peck, 12 R. I., 485.)

“If a woman, in surrendering her person to a man, is conscious that she is committing an act of fornication instead of consummating an informal marriage, the copula cannot, for her sake, be connected with any previous words of promise so as to constitute a marriage. (Port vs. Port, 70 Ill., 484.) And a union once originating between a man and woman, purely illicit in its character, and voluntarily so, there must appear some formal and explicit agreement between the parties thereto, or a marriage ceremony, or some open and visible change in their habits and relations, pointing to honest intentions, before their alliance can be regarded as converted into either a formal or informal marriage.” (Schoul. Dom. Rel., 5th ed., p. 49, and cases cited.)

strictly a church function. The Lord Hardwicke Act, of 26 Geo. II., was to annul the common law which ran counter to the desires of ambitious churchmen, and provided that all marriages should be solemnized in a parish church, with previous publication of the banns, and unless so solemnized were void, unless a special license had been granted. This harsh act was subsequently amended to allow a civil ceremonial before a register. This law, though not a part of our common law, has so moulded statute and custom as to make either a church or a civil marriage, before a designated officer, the usual marriage celebration. (Schoul., Dom. Rel., Sec. 28.)

In 1844 the question whether a common law marriage without religious ceremony was valid, went to the House of Lords and resulted in an equal division (*Queen v. Willis*, 10 C. & F., 534.) And the Supreme Court of the United States divided upon the same question in *Jewell v. Jewell*, 1 How., 219. But the generality of State courts have upheld the informal marriage against even legislative provisions for a formal celebration. And the Supreme Court, endeavoring to harmonize the rules of States and recognize marriage as a matter of common right, decided in *Meister v. Moore*, 96 U. S., 76, that unless the local statute which

*It is an evidence of the good sense of American legislators, and their belief in the efficacy of democratic customs, that the common law marriage, or the crude and simple ceremony before the backwoods justice, is made of equal validity with the long drawn, often hypocritical, rites conducted by the silk-gowned ecclesiast.

prescribes regulations for the formal marriage ceremony positively directs that marriages outside of its provisions shall be deemed void, the informal marriage by words of present promise must be pronounced valid, though the statute is contravened. (Schoul., *Dom. Rel.*, 5th ed., Sec. 29.)

The necessity of formalities to the validity of the marriage ceremony depends upon the law of the State or country where the marriage is contracted. (Story, *Conf. Laws*, 121-4.) To decide whether in a given State formalities are essential, reference must be made to the primary laws and to the statute laws. If the primary laws require no formalities, a statute requiring formalities will not be held to affect the validity of a marriage executed without them, unless it expressly refers to such formalities, and expressly makes their omission invalidate the marriage. (1 Robertson, *Ec. Law*, 304.) So where a State forbids solemnization without a license, yet in the absence of a clause of nullity, the marriage without it is valid. (*Cannon v. Alsbury*, 1 A. K. Marsh, 76; *Stevenson v. Gray*, 17 B. Monr., 193.) But the person solemnizing such marriage may be subjected to a penalty. (Bishop, *Mar. & Div.*, Secs. 283-7.)

Sec. 299. SAME SUBJECT—CONSENT OF PARENTS.—Lord Hardwicke's Act, referred to in the previous section, made the marriage of minors void unless with the consent of parents or guardians. This provision was so intolerable that Gretna Green marriages became the rule, and the act was so modi-

fied as to allow the marriage to be valid, although forbidden. And as a general rule in the several States a marriage of minors, without parental consent, though required by statute, is valid, but subject to be revoked by the parties for lack of capacity, as we have seen in a previous section. (Schouler, *Hus. & Wife*, Sec. 36; Bishop, *Mar. & Div.*, Secs. 341-347.) Runaway marriages of minors are discouraged by inflicting penalties upon the clergyman or magistrate who solemnize such marriages, but the marriage itself when properly consummated, is valid.

Sec. 300. FOREIGN MARRIAGES.—As a matter of comity among nations, a marriage valid where celebrated is valid everywhere. But this general rule is to be qualified to this extent: First, as to matter of ceremony or form, a marriage valid where entered into is valid everywhere; second, as regards capacity to marry, some jurisdictions hold that the parties must satisfy the law of their domicile; third, where the domicile of the parties is not the same, the courts of the domicile of one will sustain the marriage, though the other party be disqualified by the law of his or her domicile. (*Sottomayer v. DeBarros*, 3 P. Div., 1; *State v. Ross*, 76 N. C., 242; *Williams v. Williams*, 5 Iredell (N. C.), 535; *Contra, Thorp v. Thorp*, 90 N. Y., 602.) The rule is stated by some writers to be that a marriage valid where contracted is valid everywhere, and this though the parties intend to evade local statutes, except incestuous or immoral marriages, which must satisfy the statutes of the domicile. See Browne,

Dom. Rel., 12-13; Schoul., Sec. 32. In *State v. Kennedy*, 76 N. C., 251, where a negro and a white person, living in North Carolina, went into another State and were married to evade the law which prohibited such a marriage, the marriage was held void, though valid by the laws of the State where contracted. And the marriage of an Englishman to his deceased wife's sister in Denmark, where such a marriage is valid, was held void in England. (*Brook v. Brook*, 9 H. L., 193.)

CHAPTER II.

OF THE STATUS OF MARRIAGE.

Sec. 301. THE FAMILY.—The most important incident of the marriage relation is the establishment of a group unit called the family. The very word family denotes, in its ancient signification, a group assembled around an altar for religious service. These services being conducted by the father or husband, he naturally came to be called the head of the family. In the Roman and Hindoo societies the family became a more complicated group than in modern society. The patriarchal family consisted of wife, children, slaves, land, and goods, all held together by subjection to the despotic authority of the eldest male of the eldest ascending line, being the father, grandfather, or even more remote ancestor.*

Among most ancient societies women were not extended the privileges and immunities of the men, and a woman was first subjected to her father's will, and when married to that of her husband. By the common law the family is treated as a unit, and for all practical purposes the husband is the ruler. Blackstone says, "By marriage, the husband and wife are

*Maine, *Early Hist. of Institutions*, p. 310; Coulanges, *Ancient City*.

one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she performs everything; and is, therefore, called in our law-french a *feme-covert*; is said to be *covert-baron*, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her *coverture*." (Com. I., 442.) In carrying out this legal fiction the husband was invested with many powers over the property and even the person of the wife; was considered incapable of granting anything directly to his wife or entering into a covenant with her; and was made responsible for her debts, frauds or injuries, before or after marriage. For crimes committed before marriage the wife was responsible, but for crimes less than treason or murder, committed after marriage in the husband's presence or at his command, she was not responsible, as they were presumed to be done by coercion. Some of these provisions were doubtless for the protection and benefit of the wife, as Blackstone claims.*

The common law doctrine in regard to husband and wife has not stood intact, nor has the legislation of sovereign States been uniform in fixing the rights, duties and liabilities of married parties to each other and the public. It will be our purpose in the succeeding sections to consider briefly the modifications of the common law, whether in equity or by statute.

*I. Bl. Com., 445. See Schouler, Sec. 34.

Sec. 302. **MUTUAL DUTIES.**—The wife is to love, honor and obey; and the husband is to love, cherish and protect his wife, and deliver her from insult and treat her kindly. The husband undertakes to furnish his wife a suitable home, and maintain her according to his means and condition, and provide for their offspring; having done this his authority over the wife is admitted, and her wishes must yield to his. Modern statutes enlarging the wife's property rights do not deprive the husband of his authority as head of the house. (*Oliver v. Oliver*, 1 Hag. Con., 363; *Tyler v. Sanborn*, 128 Ill., 136.)

The husband's surname is conferred upon the wife, and she retains it until either divorced, with restitution of name, or, being a widow, marries again, or until she acquires a new name by reputation. (*Tendall v. Goldsmid*, 2 Pro. Div., 263.)

Sec. 303. **DOMICILE.**—A marriage implies a home, and the general obligation of the parties to live there together. The husband as head of the family selects the home, and it is the duty of the wife to live there with him, and his domicile determines hers. (*Greene v. Greene*, 11 Pick., 410-415.) But the wife may obtain a separate domicile for the purpose of obtaining a divorce. If the husband abuses his wife, or makes the home unfit for a respectable woman to live in, she may leave him. (*McCormick v. McCormick*, 19 Wis., 172.) So the wife need not follow her husband into banishment or to prison, and a temporary separation, made necessary by the husband's trade or

calling, is no breach of the marital duties. (Schoul., Dom. Rel., Sec. 35; Browne, 16.)

The husband is not justified in ordering his wife to follow him on a long or perilous journey, or into an unsafe country. And in general any cause justifying divorce will justify the innocent party leaving the home of the other. (Boyce v. Boyce, 23 N. J. Eq., 337; Powell v. Powell, 29 Vt., 148.) The wife on her part is not justifiable in making the husband's life miserable by reason of her violent and outrageous behavior. Such conduct may justify him in leaving her, but not sustain an action for divorce. (Lynch v. Lynch, 33 Md., 328.)

The marriage of an alien woman to a citizen of the United States makes her a citizen of the United States and a partaker of all the advantages conferred by the laws of the husband's domicile. (Luhrs v. Eimer, 80 N. Y., 171.)

Sec. 304. **MUTUAL RIGHTS OF SOCIETY AND COMPANIONSHIP.**—The husband and wife are each equally entitled to the society and companionship of the other. (Hutcheson v. Peck, 5 Johns, 196.) The common law gives the right of action for damages against any person enticing away a spouse, or inducing him or her to live apart from the other. (Modisett v. McPike, 74 Mo., 636; Westlake v. Westlake, 34 O. St., 621.) But the action of the defendant must have been malicious, or from improper motives, and parents and near relatives are treated more considerately than mere strangers in this respect, and are

entitled to shelter and protect the wife leaving her husband for cause, but must give her up whenever she wishes to return to her husband. Schouler states the legal doctrine to be, that honest motives may shield a parent from the consequences of indiscretion, while adding nothing to the right of actual control—the intent with which the parent acted being the material point, rather than the justice of the interference; that a husband forfeits his right to sue others for enticement, where his own misconduct justified and actually caused the separation; but that otherwise his remedy is complete against all persons whomsoever, who have lent their countenance to any scheme for breaking up his household. (Dom. Rel., 5th ed., Sec. 41; *White v. Ross*, 47 Mich., 172.) An action for debauchery or enticement with bad motives may accrue without the wife actually leaving the house. (*Rhinehart v. Bills*, 82 Mo., 534.)

The action by the wife for the enticement of her husband was undeveloped at the old common law, and while now quite generally admitted, is opposed in a few States. (*Duffies v. Duffies*, 76 Wis., 374; *Doe v. Roe*, 82 Me., 503.) See Note to Schoul., Dom. Rel., 5th ed., Sec. 41.

Sec. 305. **SUPPORT AND SERVICE.**—The husband is bound to provide the family support and means of living, and the wife for her part must render such services as are incident to the care of the house and its contents; the one is equivalent of the other, and the wife is not entitled to compensation for taking

care of an insane husband. (*Grant v. Green*, 41 Ia., 88.)*

The support which the husband is to furnish includes food, clothing, lodging, medical attendance and the like, suitable to his condition in life and his income. Mere inability to support, proceeding from no unkindness or indifference, is not a ground for divorce. (*Skean v. Skean*, 33 N. J. Eq., 148; *Bruner v. Bruner*, 70 Md., 105.) Nor is his saving and frugal disposition, when he could afford to be liberal. (*Runkle v. Runkle*, 96 Mich., 493.)

As an incident to his duty to support the household the husband has the right to prescribe rules for the conduct of the house and the regulation of expenses. He is also entitled to choose the persons who shall share the hospitality of his home, even if he restricts the guests to those alone who are agreeable to him. (*Evans v. Evans*, 1 Hag. Con., 115; *Fulton v. Fulton*, 36 Mo., 517; *Schoul.*, Dom. Rel., Sec. 46.) And by the early common law to moderately chastise the wife. (1 Bl. Com., 444-5.)

Sec. 306. HUSBAND AND WIFE AS WITNESSES.—As a rule of the common law husband and wife cannot be witnesses or testify for or against each other, and the rule holds though both parties consent. (*Davis v. Dinwoody*, 4 Tr., 678.) And the rule holds

* "The husband must support himself, his wife, and his minor children out of his property or by his labor. If he is unable to do so, the wife must assist him so far as she is able." (Rev. Stat. Ohio, Sec. 3110.)

after the dissolution of the marriage by death or divorce. (1 Greenleaf Ev., Sec. 340.)

Blackstone bases the rule on the unity of the spouses; other writers find the reason of the rule to be that public policy requires that the marital relation which demands unlimited confidence between the spouses be protected by law; and the confidence of the parties in each other be encouraged by knowing that it may not be divulged, willingly or unwillingly. (1 Bl. Com., 443; 2 Kent. Com., 178; 1 Greenl. Ev., Sec. 254.)

But modern statutes have to some extent changed this rule, and a husband may be a witness in reference to transactions concerning his wife's separate property, as here they have separate interests to maintain. (61 Ill., 26.) So where the conversation between husband and wife was in the presence and hearing of a third party the confidential nature ceases and either party may testify. (Sessions v. Trevitt, 39 O. St., 259.) And by statute husband and wife are made competent as witnesses in behalf of each other in all criminal cases, or for cruelty to minor children, provided that they shall not testify concerning any communication made or act done during coverture. They are also allowed to testify in proceedings for divorce. (Rev. Stat. Ohio, Secs. 7284, 5697.) The statutes changing the rule are not harmonious and must be examined. (92 N. Y., 554; Bitner v. Boone, 128 Pa. St., 567; Blanchard v. Moors, 85 Mich., 380.)

Sec. 307. HUSBAND'S LIABILITY FOR WIFE'S DEBTS BEFORE MARRIAGE.—At

common law, immediately upon the marriage the husband becomes liable for the debts of his wife contracted while she was single, for as Blackstone observes, he has adopted her and her circumstances together. This liability for the wife's previous debts is a sort of recompense for taking her property, but he is liable though the wife has no property and concealed the debts from him. (1 Bl. Com., 443; Schoul., Dom. Rel., Sec. 56.)

The obligation extends only to her legal debts, but may not be relieved or modified by an agreement between husband and wife before marriage or during coverture. (*Harrison v. Trader*, 27 Ark., 288; Schoul., Dom. Rel., Sec. 57.) The suit to charge the husband for such debts of the wife must be brought during the coverture, and must be brought against them jointly, and not against either separately. So, if the husband dies and the wife's debts while single have not been paid, his estate is not liable, and this is so though she has brought him property. (2 Jones Eq. (N. C.), 204.) If the wife survives she becomes liable again for her previous debts.

Sec. 308. SAME SUBJECT—STATUTORY CHANGES.—State statutes quite generally release the husband from liability for the debts of the wife contracted before marriage. In a few States he is still liable for such debts; first, to the extent of any property acquired from the wife by an ante-nuptial agreement; second, to the extent of any property received by him from or through the wife.

Sec. 309. HUSBAND'S LIABILITY FOR WIFE'S DEBTS AFTER MARRIAGE.—After marriage, at common law, the legal identity of the wife is merged in that of her husband, and while the husband is bound for all just debts incurred in her support, and may be bound by her contract for necessities, the wife cannot make a contract so as to bind herself. The general rule being that a married woman cannot make a valid contract of any description in relation to real or personal property. (1 Bl. Com., 442.) The husband alone is liable for the frauds and injuries of the wife, committed during the marriage, and may be sued either alone or jointly with her for the damages resulting. But he also has the benefit of the right to sue for and recover damages for any injury done to her. (Schoul., Dom. Rel., Sec. 54; *Goodrich v. Tracey*, 43 Vt., 314.)

To illustrate the wife's disability at common law, Schouler cites these cases: "She cannot earn money for herself. She cannot, jointly with her husband or alone, sign or endorse a promissory note, so as to bind herself; nor execute a bond or other instrument under seal; nor purchase on her own credit; nor agree to keep a money deposit payable on demand; nor be surety for her husband or another; nor bind herself by a recognizance; nor execute a letter of attorney; nor otherwise make a valid contract." (Dom. Rel., Sec. 58, and cases there cited.) She is permitted to pass title to her real estate by joining in a deed with her husband, but she would not be bound by her covenants therein. (*Jackson v. Vanderheyden*, 17 Johns.

(N. Y.), 167.) All such contracts of a wife at common law were void, and were also unenforcable after her divorce, or after the death of the husband, unless a new promise after the disability was removed had been made upon a new consideration. (*Putnam v. Tennyson*, 50 Ind., 456; *Davis v. Carroll*, 71 Md., 568.)*

Sec. 310. CONVEYANCES AND CONTRACTS BETWEEN HUSBAND AND WIFE.—At common law, as distinguished from equity, the husband and wife could not convey to or contract directly with each other, and such conveyances or contracts were treated as absolutely void. (Co. Litt., 112, a, 187, b; 2 Kent, Com., 129.) But husband and wife might convey to each other by the intervention of a third party or trustee. (Co. Litt., 30.)

Sec. 311. SAME SUBJECT—EQUITY DOCTRINE.—A deed directly from husband to wife will be sustained in equity where there is an ante-nuptial agreement, or the wife gives up the right to her dower as a consideration. And a husband and wife may con-

*The modern statutes which enable married women to contract generally, or in reference to their separate property, usually exempt the husband from liability for the wife's separate debts after marriage, and especially where they are in reference to her separate property, trade, business, etc., or are for the benefit of her family. Nor is he generally liable for any judgment recovered against the wife alone. So where the wife has power to contract, and has been dealt with on her own account, he is not liable, and it is doubtful if the husband can ratify such a contract, or render himself liable, except on a new consideration. (53 Ind., 138; 7 Baxter, 411.) See part, Sec. 327.

tract for a bona fide and valuable consideration for a transfer of property from him to her. (*Livingstone v. Livingstone*, 2 Johns., Ch. 537.) As a general rule, wherever a contract is just and reasonable of itself, and would be good when made with trustees for the wife, and especially if for good and meritorious consideration, that contract will be sustained in equity, when made between husband and wife without the intervention of trustees, notwithstanding that at common law spouses could not make mutual contracts. (*Schoul., Dom. Rel.*, Sec. 191; *Barron v. Barron*, 24 Vt., 375; 2 Story, Eq. Juris., Sec. 1204.)

Sec. 312. SAME SUBJECT—SUMMARY OF PRINCIPLES.—1. None of the disabilities incident to married women are imposed upon the condition of a married man, who is as free to receive title to property and dispose of it after marriage as before, with the exception that he cannot by any conveyance divest the inchoate right of dower which his wife has in his real estate. 2. All conveyances directly from husband to wife, without the intervention of a trustee, are void at law. 3. A direct conveyance from husband to wife will be sustained and upheld in equity in the following cases: (a) When the consideration of the transfer is a separate interest of the wife, yielded up by her for the husband's benefit or that of their family, or which has been appropriated by him to his uses. (b) Where the husband is in a situation to make a gift to his wife, and distinctly separates the property given from the mass of his property, and sets it apart to the

sole, separate and exclusive use of his wife. (c) Where a wife advances money to her husband, or the husband is indebted to the wife on any valid consideration, the wife stands as the creditor of the husband, and if the conveyance is made to secure or pay such liability, the wife will hold the property free from the claims of other creditors, if the transaction is unaffected by unfairness and fraud. (d) When the transfer is made through a third party or trustee. (e) When the husband is out of debt and conveys property to his wife for a nominal consideration, the law will presume that it was intended as a provision for her. (f) A conveyance from husband to wife, good in equity, vests the title to the property in the wife as fully as though the deed had been made by a stranger upon a full and valuable consideration. (Schoul., Dom. Rel., Sec. 188 and note.) The rule in the chancery courts of the various States being that gifts of personal property or voluntary conveyances of real estate between husband and wife are valid, unless in fraud of creditors. (Sims v. Rickets, 35 Ind., 181; Schoul., Dom. Rel., Sec. 189.) And the wife may make gifts to the husband which will be sustained. (Imlay v. Huntington, 20 Conn., 146.)

Sec. 313. POWER OF WIFE TO CONTRACT AS HUSBAND'S AGENT.—Though the common law does not allow the wife to make contracts, it does allow her to represent her husband as his agent, and bind him as the principal. Blackstone observes that this power of the wife implies no separation from, but

is rather a representation of, her husband, and his responsibility for her contracts results from the fact that they are really his. (1 Bl. Com., 442.)

The wife may be expressly authorized by the husband to act for him, and in this case her authority does not extend beyond the scope of the power given. Her authority may be implied from his acts and conduct respecting her, and then the general rule of agency applies, that such agency is to be measured by the usual scope of the employment. (*Mickelberry v. Harvey*, 58 Ind., 523.) So where the agency is limited to specific acts the wife cannot bind the husband as to acts not connected with her authority. (22 Me., 335.) Her authority is also implied if the employment is such that she is expected naturally to share in it, as the management of the household, conduct of a small shop, etc., or when the husband is from home. (*Benjamin v. Benjamin*, 15 Conn., 347; *Browne*, 25.) Where the wife has been in the habit of doing certain acts with the knowledge and assent of the husband his authority will be implied. And where he is temporarily from home and she is left in charge of the household she has, as his agent, such authority as is incident to the trust. (*Camelin v. Palmer*, 10 Allen, 539; *Schoul.*, *Hus. & Wife*, Secs. 127-30.)

Sec. 314. SAME SUBJECT—NECESSARIES.—

The common law, which deprived the wife of her property and gave it to the husband, protected her life at least, by recognizing her authority as agent of the husband to supply her indispensable wants at his ex-

pense.* This rule of law is based on the husband's duty to support the wife, and to prevent her from becoming a burden to the community. And this duty extends to the family or children. (Schouler, Dom. Rel., Sec. 61.)

At the early common law the necessities for which a wife might pledge the credit of her husband were few in number, and those which ministered directly to her health and comfort, as food, drink, lodging, fuel, washing, clothing and medical attendance. (18 Conn., 422.)

But the later and better rule is, that necessities are not to be limited to articles of food or clothing, or what is necessary to maintain life and preserve decency, but include such articles of general utility as are suitable to maintain the wife according to the state and degree of her husband. (14 Mass., 424.) And there is no general rule for the specific determi-

*To enforce the marital obligations the law takes a circuitous course, and the wife may secure herself from want against a cruel and miserly husband, of ample means to support her, by pledging his credit and making such purchases as are needful, on the strength of an implied authority for that purpose. Here, all other things being equal, it is presumed that she was her husband's agent, and no direct permission need be shown. Indeed, wherever the facts are clear that those articles were actually needed, and that the husband failed to supply them, this presumption is carried so far as to control even the express orders of the husband himself. The articles for which a wife is allowed to pledge her husband's credit as his presumed agent are designated at common law as necessities." (Schoul. Dom. Rel., 5th ed., p. 98.)

nation of this question in every case. (133 Mass., 504; 1 Bl. Com., 442.)*

The husband's liability varies to some extent when his wife lives with him and when she does not, and according to the cause of their separation. These distinctions we shall notice briefly.

Sec. 315. SAME SUBJECT—WIFE'S NECESSARIES WHEN LIVING WITH HER HUSBAND.—When husband and wife are living together it is generally presumed that the wife has implied authority to make purchases of necessities, and for such goods supplied her in good faith the husband is *prima facie* responsible. (*Clifford v. Laton*, 3 Car. & P., 15.) But the husband's liability is based upon his implied or express authority, and may be rebutted on proof that he has supplied her with necessities or gave her the ready money to make the purchases, or supplied her through other agents. (*Manby v. Scott*, 1 Sid., 109.) So, if the husband is willing to provide the necessities at his own home he is not liable to pro-

*See Schoul. Dom. Rel., Sec. 61 note, and Browne, 20, for specific cases deciding what are necessities, and what are not. Examples of necessities are given as: A horse worth \$40, for the use of invalid wife of a miller earning \$30 a month, a set of artificial teeth, a piano, counsel fees to a deserted wife being pressed for tradesmen's bills, watches and jewelry such as befit the style of dress which the husband sanctions, especially if not wholly ornamental. The following were held not to be necessities: A \$350 watering-place outfit for the wife of a poor barrister; the expense of an indictment against the husband for an assault on wife; services of a clairvoyant; a church pew; a ball dress worth \$80; pipes, tobaccoes and cigars; counsel fees in a suit for divorce.

vide them elsewhere, and, in general, while living together and the wife is properly supplied, the husband will not be liable for other debts made by her on account, without his previous authority or subsequent sanction. (*Morgan v. Hughes*, 20 Tex., 141; *Schouli. Dom. Rel.*, Sec. 63.)

The husband may also give notice directly to the persons furnishing the goods not to supply the wife on his credit, and not afterwards be bound. A written notice to the dealer is sufficient, but a notice published in a newspaper is not unless it was actually brought to the attention of the creditor. (*Walker v. Leighton*, 11 Fost. (N. H.), 111.) After such notice the seller to bind the husband must show that the articles were necessaries and that the husband has not properly supplied the wife. (*Barr v. Armstrong*, 56 Mo., 577.)

The husband may ratify the purchase and will be bound the same as if he had given authority, and this ratification may be implied unless his dissent is expressed in an effectual and positive manner. If he has notice of the purchase or debt being made he should positively refuse to pay. (*Cothran v. Lee*, 24 Ala., 380; *Conrad v. Abbott*, 132 Mass., 330.)

Sec. 316. SAME SUBJECT—WIFE'S NECESSARIES WHEN LIVING APART FROM HER HUSBAND.—As a general rule the husband is liable for the wife's support if they are apart by his fault, but not otherwise. (*Browne*, 22.) The separation by the fault of the husband may arise in three ways: First, where the husband unlawfully abandons the wife; sec-

ond, where he turns her out without reasonable cause; third, where his ill-treatment makes it necessary for her to leave him. When the wife is thus apart from her husband without provision for her support, he is liable for necessities furnished her, and she may pledge his credit therefore by virtue of the marriage obligation, her authority sometimes being called an authority of necessity. (2 Kent. Com., 146-7; Schoul., Dom. Rel., Sec. 66; *Eiler v. Crull*, 99 Ind., 375.)

In the first two cases above the husband's own act imposes the necessity and the wife's conduct is involuntary. But in the third case the wife's conduct is in a sense voluntary, and must be founded on a just apprehension of personal violence, or because the house has been rendered unfit for her as a modest and chaste woman. (*Hultz v. Gibbs*, 66 Pa. St., 360.)

When the wife has been compelled to leave by the fault of her husband, his notice to individuals, either directly or by publication, will not relieve him from the responsibility of her debts contracted under such circumstances. (*Watkins v. DeArmond*, 89 Ind., 553.) It is sometimes held that only what would be cause for a divorce "a thoro" will justify her leaving him. (*Thorpe v. Shapleigh*, 67 Me., 235; *Barker v. Dayton*, 28 Wis., 367.) It is held that if she leave him without sufficient cause, and afterwards returns, and her husband refuses to receive her, she can go away and bind him for necessities, provided she has conducted herself properly in her absence. (*Howard v. Whetstone*, 10 Ohio, 365; 11 Johns., 281.) But if the wife elopes and commits adultery, the husband is not liable for

her necessities, though he refuses to take her back. (*Oinson v. Heritage*, 45 Ind., 73.)

Where the husband and wife live apart by mutual consent, and the husband regularly pays the wife a reasonable allowance, or a decreed alimony, he will not be liable for necessities. (*Schoul., Dom. Rel.*, Sec. 68.)

Sec. 317. SAME SUBJECT—SUMMARY OF PRINCIPLES.—1. While the husband and wife cohabit, it is usually for the husband to show want of authority in the wife to purchase necessities; when they are apart the seller must prove authority, or that the wife needed the goods, and was not at fault.

2. The wife's right to bind her husband results from two considerations: (a) That the husband has failed in his duty to furnish her proper support, without any fault on her part absolving him. (b) That as the authorized agent of her husband she has the right to bind him within the scope of her authority, like other representatives.

3. Parties cohabiting as husband and wife, whether actually married or not, come within the provisions of the above principles, and the man will be bound for necessities furnished to the woman whom he has held out to society as his wife. (*Schoul., Dom. Rel.*, Secs. 69-71.)

Sec. 318. HUSBAND'S LIABILITY FOR WIFE'S WRONGS.—At common law the husband is liable in all civil suits founded upon the wife's torts or wrongs committed before or during coverture. But

in this case they must be validly married and not merely cohabiting, the responsibility being different from that in the case of necessities. For the crimes of the wife the husband is not punishable unless committed in his presence and by his direction, when she is presumed to act by his coercion. But the presumption of coercion may be disproved and the wife made responsible; and for her more serious crimes she is always responsible. (1 Bl. Com., 444; Browne, Dom. Rel., 26.)

By statute now, in some States, the husband is not liable for the acts of the wife. (Rev. Stat. Ohio, Sec. 3115.) In others he is liable in case the wrong was committed under his coercion, or where he would be liable if they were not married. (Schoul., Dom. Rel., 5th ed., Sec. 170n; 32 Kans., 409.)

The common law gave the husband a right of action for injuries to the wife's person or character, and a separate action for the loss of her society and the expenses caused. But neither could recover damages for the instantaneous death of the other, caused by the negligence of a third person. But this action is now given by statute. (Browne, Dom. Rel., 27-8; Green v. Railroad Co., 23 Barb., 9; Dickens v. Railroad Co., 28 Barb., 41.) For injuries to the person or character of the wife, the husband and wife should sue together. (60 Tex., 331; Hyatt v. Adams, 16 Mich., 180; Schoul., Dom. Rel., Sec. 77.) It is to be observed that State statutes in many instances completely reverse the old rules of the common law.

Sec. 319. THE WIFE'S PROPERTY.—The property of the wife affected by her marriage is either

real or personal property; and personal property is either in possession, or in action. We shall inquire how these species of property were treated after marriage, both at common law and in equity.

Sec. 320. THE WIFE'S PERSONAL PROPERTY AT COMMON LAW.—By the common law the wife's personal property in possession, as money, furniture, farm stock, etc., became the property of the husband as soon as they were married. Her things, or choses in action, such as bonds, notes, checks, accounts, rents, legacies, etc., became his when reduced into possession, that is, collected in. Thus the husband's right to her property in possession was absolute, but his right to her choses in action is qualified, and unless reduced to possession during the coverture he loses his right to them. The reduction consists in the two elements, first, the intent to reduce; second, some positive act asserting ownership. Hence the mere possession is not enough to reduce to possession, and if the chose consists of bank stock it is necessary for him to sell it or have it transferred on the company's books from her name to his. (143 Mass., 340.) So at common law the earnings of the wife vest in the husband, and the product of their joint labor belongs also to the husband. (Schoul., Dom. Rel., Secs. 80-85, and cases cited.)

The wife's paraphernalia, by which is meant her wearing apparel, ornaments, and articles of personal convenience, which she had at marriage, or acquired from the husband before or during marriage, are the

husband's during his life and he might sell or dispose of them, but after his death they belong absolutely to the wife. (*Tipping v. Tipping*, 1 P. Wms., 730; *State v. Hays*, 21 Ind., 288.)

Sec. 321. THE WIFE'S PERSONALTY UNDER MODERN STATUTES.—Modern statutes have revolutionized the wife's property rights. Many States following the New York statute continue the wife as absolute owner of all her personal property, and separate earnings, whether acquired before or after marriage, free from the interference or control of her husband, or from being charged with his debts. She has free and full power to manage and dispose of such property at pleasure. (*Browne*, Dom. Rel., 30; Rev. Stat., Ohio, Sec. 3111.)

Sec. 322. THE WIFE'S REAL CHATTELS AND REAL ESTATE AT COMMON LAW.—The wife's chattels real, as leases and terms for years, become the property of the husband at marriage, and he might sell, assign, mortgage or otherwise dispose of them without her consent, but some such act of appropriation on his part was necessary before the wife's death. They were also liable for his debts. (*Co. Litt.*, 46c; 2 Kent., Com., 134.)

The real estate belonging to the wife was not at marriage transferred to the husband, and the ownership remained in the wife. But the husband became entitled to the usufruct, or rents, incomes and profits, during coverture. And in case living issue is born of the marriage, his usufruct interest is extended beyond

their joint lives, and extends for his life whether the wife dies before him or not. After issue born the husband's estate is called tenancy by courtesy. (2 Kent., Com., 130; Schoul., Dom. Rel., Sec. 89.) If no issue is born alive, the husband's interest lasts only while the wife lives. And in either case his interest is only beneficial, and terminates at his death; when it vests absolutely in the wife or her heirs, and his relatives have no interest in it. (Clark's Appeal, 79 Pa. St., 376; Co. Litt., 351a.)

At the early common law the husband alone had power to bind or alienate the wife's lands during coverture, but his power only extended to a sale of his interest, and at the termination of his estate the wife or her heirs could enter and recover the lands. By modern statutes in England and America, married women may alienate or incumber their real estate by conveyances executed in conformance with the statute. These statutes usually require that the wife shall make an acknowledgment before the prescribed officer, apart from her husband, that her consent is freely and voluntarily given. (Schoul., D. R., Sec. 94; 2 Kent. Com., 133, 166.) A defective conveyance of her land will not be treated as a contract to convey, or as an estoppel. (Bagby v. Emberson, 79 Mo., 139.) The wife's executory agreement to convey real estate is void in the absence of enabling statutes. (Parks v. Barrowman, 83 Ind., 561.)

Sec. 323. SAME SUBJECT—THE WIFE'S RIGHT TO DOWER IN HER HUSBAND'S REALTY.—The common law which befriended the

husband so much gave the surviving wife, or widow, the use and enjoyment, for her life, of one-third of all the real estate in which the husband was seized of an estate of inheritance at any time during the coverture. During the husband's life dower is said to be inchoate, but it cannot be divested by any act of the husband or his creditors. By statute the wife may release her dower by joining in a deed with her husband.*

By modern State statutes enlarging married women's property rights, the wife is made the absolute owner of her real estate, acquired before or after marriage, and it is held free from the husband's interference or control, or for liability for his debts, except such as she may contract for the support of herself and her children as his agent. She has the power to sell, mortgage, lease or will it as if single, except that if she dies intestate his tenancy by courtesy attaches as at common law. (N. Y. Laws, 1860, ch. 90; *Pray v. Stebins*, 141 Mass., 219; *Neely v. Lancaster*, 47 Ark., 175; 58 Am. Rep., 752.)

Sec. 324. THE WIFE'S PROPERTY IN EQUITY.—At common law, when the husband was obliged to seek the aid of a court of equity to recover his wife's property, the court, before decreeing him possession, would oblige him to make a reasonable provision out of it for his wife's support and that of her children. This was called the wife's equity to a settlement. (2 Kent., Com., 139-43.)

*In Ohio courtesy is abolished, and the widow and widower are equally entitled to dower in the estate of the deceased consort. (Rev. Stat., Ohio, Sec. 4188.)

Where property was conveyed to the wife before marriage, either by the husband or third parties, and in the conveyance it was provided that it should be held by her as her sole and separate property, or where it had been conveyed to trustees for her sole and separate use, with the intention to exclude the husband from interest therein, it could be held by the wife free from the liabilities otherwise imposed by the common law. This is known as the wife's separate estate in equity, and superseded in point of time the modern statutory separate estate. (Schoul., D. Rel., chs. 7 and 8; 2 Kent. Com., 163.) The intervention of trustees is not now necessary (81 Ill., 64.) And where the conveyance to the wife expressly or impliedly gives her the power to convey or will the estate, she may do so by a conveyance or will in the manner prescribed in the instrument giving her the power. (1 Johns., ch. 45.)

Sec. 325. SAME SUBJECT—CREATING THE SEPARATE USE.—To overturn the general rule of the common law vesting the wife's property in the husband or limiting it to his use, and establish the wife's equitable separate use, there must be a clear intent to create a separate estate for her. While technical words are not necessary to create such a separate estate, a clear intention in the donor that the property is for the separate use of the wife should appear by accurate language. (Brandt v. Mickle, 28 Md., 436; 81 Ky., 129.) The following phrases have been held to create a separate estate in the wife: "For

her sole and separate use" (*Parker v. Brooke*, 9 Vesey, 583); "sole use and disposal" (17 Ch. D., 794); "as her separate estate" (*Fox v. Hawks*, L. R. 13 Ch. D., 822). While these phrases have been held insufficient to create a separate estate in the wife: "For the use of his wife" (1 Rich. Eq., 222); "in trust for her" (49 Conn., 52). The equity courts give the wife the power of enjoying this property free from the husband's control, yet they do not enlarge her liability for the support of the family, or diminish the husband's obligation to support her. (*Lumb v. Milne*, 5 Ves., 520.) But the wife may contract so as to bind her estate for her own and his debts. (51 Vt., 495.)*

Sec. 326. THE WIFE'S SEPARATE PROPERTY BY STATUTE.—The equitable doctrine of the wife's separate property could not satisfy the ideals of democratic America, and a more effective modification of the common law rules governing the wife's property had to be made. The married women turned to the Legislatures rather than to the courts for their rights. The principles of self-government, the spread of education, the equal social intercourse of the sexes, and the critical and iconoclastic spirit of the age re-

*The doctrine of equitable separate estate in the wife was adopted into some of the United States at an early day. But the decisions upon the subject are mostly confined to those States, as New York, New Jersey, Pennsylvania, Maryland, Virginia, where chancery courts had been established. The New England States and the States formed from the Northwest Territory did not recognize the wife's equitable separate use. (Schoul. Dom. Rel., Sec. 112.)

sulted in a peaceful revolution of the common law as regards the property rights of married women. The change was fully effected in 1848 in a few States, and has since extended to every State in the Union. (Schoul. Dom. Rel., Sec. 113, note.)*

The statutory changes and modifications have continued until the married women in some States are completely emancipated as regards their property from marital restraints. But as each State has chosen its own method of liberating married women, and the courts of the different States have followed no uniform plan of interpretation, a most unsatisfactory and confusing lot of precedents have resulted. (Stimson, Am. Stat. Law., Secs. 6420-6422.)

Sec. 327. SAME SUBJECT—SUMMARY OF MODERN LEGISLATION.—1. "The property, both real and personal, which any married woman now owns as her sole and separate property; that which comes to her by descent, devise, bequest, gift,

*On the 7th of April, 1848, the Legislature of New York enacted a law providing that the real and personal property of any female already married, or who may hereafter marry, which she shall own at the time of the marriage, and the rents, issues and profits thereof, shall not be subject to the disposal of her husband, nor be liable for his debts, and shall continue her sole and separate property as if she were a single female; and that any married female may lawfully receive and hold property in like manner from any person other than her husband, whether by gift, grant, devise, or bequest. And the Legislature of Pennsylvania about four days later conferred substantially the same rights of property upon married women in that State. (Schoul. D. Rel., Sec. 113.)

or grant; that which she acquires by trade, labor, business, or services, carried on or performed on her sole and separate account; that which a married woman owns at the time of her marriage, and the rents, issues and proceeds of all such property, shall be her sole and separate property, and may be used, collected, and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts, except such as may have been contracted by her as his agent for the support of herself and her children.

2. "She may bargain, sell, assign and transfer her personal property, and carry on any trade or business, and perform any labor or services on her own account, and her earnings therefrom shall be her sole and separate property, and may be used or invested by her in her own name.

3. "She may bargain, sell and convey her real estate, and contract with reference to the same as if unmarried, and she may bind her separate real estate by her covenant.

4. "She may sue and be sued like an unmarried woman in all matters relating to her separate property; she may sue in her own name for damages, or for any injury to her person or character, and the recovery shall be her sole property; and in all such actions she may execute any necessary bond or undertaking as if unmarried, and the same shall bind her separate estate.

5. "No bargain or contract made by her in refer-

ence to her separate property or business shall bind her husband, unless it relates to property given or granted her by him. In any such action the husband shall not be liable for costs or damages, and a judgment against her shall be enforced out of her separate property.

6. "The husband shall not be liable for his wife's ante-nuptial debts except to the amount of her separate property acquired by him." (Browne, Dom. Rel., 2d ed., p. 42).

7. "More recent statutes permit the wife to contract with her husband, or any other person, as if unmarried; enable the husband and wife to deed directly to each other, and relieve the husband from any liability for the wife's torts." (Browne, D. Rel., 43; Rev. Stat. Ohio, Secs. 3108-3117).

Sec. 328. SAME SUBJECT—SOME GENERAL PRINCIPLES.—The husband's vested rights in his wife's property cannot be impaired by legislation. (*Allen v. Hanks*, 136 U. S., 300.) Hence property acquired by the husband before the passage of the enabling acts could not be taken as the property of the wife, but after-acquired property may be declared to be the wife's separate estate. And the husband's expectancies and possibilities by right of marriage are not protected from such legislation. (*Cooley's Const. Lim.*, Secs. 360-2.)

If the wife's property is mixed with the husband's so as to be indistinguishable the creditors may take it as his. (11 Mich., 470.) It is treated as relinquished. (70 Mo., 214.)

In a number of States, as Massachusetts, Maine, California, Michigan and others, the presumption is that the wife's property belongs to the husband, unless by suitable words or circumstance she claim her statutory rights. (Schoul., D. Rel., Sec. 120a.) The New York rule is different, and the latest tendency is to treat it as *prima facie* her independent property without express words excluding the husband. (Qualter's Estate, 147 Pa. St., 124.)

The separate equitable estate of the wife may be still created and be subject to the rules of equity as before, the statutes simply creating a legal separate estate, but in case of doubt the preference will be in favor of the statutory estate. (MacConnell v. Lindsay, 131 Pa. St., 476; Wood v. Wood, 83 N. Y., 575.)

The equitable rule, whether in reference to equitable or statutory separate property of the wife, is that the wife may charge it with the due performance of her engagements made or incurred on its express credit, or for its benefit. (Picard v. Heine, L. R. 5, Ch. 274; Patrick v. Littell, 36 O. St., 79.) And a specific agreement to charge her separate estate is not necessary, but the conditional right and her intent to charge her estate may be inferred from the surrounding circumstances, as where she promises to pay for services when she receives her rent. (Conlin v. Cartrall, 64 N. Y., 217; 2 Kent. Com., 164; Scoul., D. Rel., Secs. 136, 144.) So the wife may bind her separate property for necessities for the family, if made on its credit and faith. (85 N. Y., 516.) But it must be clear that she

contracted the debt on her own behalf and intended to bind her property.

In some States the wife before she can carry on a business in her own name is obliged to register her intention and get a certificate, which relieves the husband of his responsibility for her debts. Other States require the husband's written assent to the wife's power to trade. (Schoul., D. Rel., Sec. 166.)*

*The husband may be employed as agent of the wife to manage her separate property without subjecting it to the claims of his creditors. (Buckley vs. Wells, 33 N. Y. 518; Schoul. D. Rel., Sec. 153.)

CHAPTER III.

SEPARATION AND DIVORCE.

Sec. 329. SEPARATION.—The separation of a married pair is to be distinguished from divorce, as it only involves a cessation of domestic intercourse and not a dissolution of the marriage. The parties continue united in form but divided in fact. The impediments of the relation still exist and the parties simply escape domestic infelicities. This marital condition is against public policy, and the law only recognizes it where unable to do otherwise. Thus a contract for future separation is treated as void, but by statute and in equity immediate separation of the parties accompanied by a contract for the support of the wife is valid. (*Albee v. Wyman*, 10 Gray, 222; Rev. Stat. Ohio, Sec. 3113.) So a contract for the support of the wife made after separation is valid. (*Fox v. Davis*, 113 Mass., 255.) And the equity courts generally recognize separation deeds so far as they concern the rights of third parties, and enforce specific performance of agreements providing for the support of the wife when the parties are living apart. (*Wilson v. Wilson*, 1. H. of L. Cas., 538; *Tallinger v. Mandeville*, 113 N. Y., 427; 35 Mich., 110.) But there is some authority to the contrary, and in North Carolina the doctrine is discarded. (*St. John v. St. John*, 11 Ves., 530; *Collins v. Collins*, 1 Phill. Eq. (N. C.), 153.)

Sec. 330. SAME SUBJECT—ABANDONMENT.—Where the wife is abandoned, and the husband has left the State, the law recognizes her right to contract, sue, and be sued as a single woman. (Hayward v. Barker, 52 Vt., 429.) In some States she is entitled to an order of court awarding her temporary alimony or support out of his property. (60 Ind., 275.) And this though she has made a contract to take a stated amount for her support. (140 Mass., 560.) Abandonment of the wife without good cause is by statute made a cause for the granting of alimony in some States, and if continued for a period of years a cause for divorce. (Ohio Stat., Sec. 5702; Schouler, D. Rel., Sec. 219.)*

Sec. 331. DIVORCE.—“On two points,” says Schouler, “English and American jurists seem to agree: first, that the government has the right to dissolve a marriage during the lifetime of both parties, provided the reasons are weighty; second, that, unless those reasons are weighty, husband and wife should be divorced only by the hand of death.” (D. Rel., Sec. 220.)*

The law recognizes three kinds of divorces:

I. Divorces declaring that there never was a legal

*Divorce laws have constantly given rise to most interesting and earnest discussions; and men differ very widely in their conclusions, while all admit the subject to be of the most vital importance to the peace of families and the welfare of nations. Some favor a rigid divorce system as most conducive to the moral health of the people; others urge a lax system on the same ground. (Schoul. D. Rel., Sec. 220.)

marriage, on the ground of the nullity of the marriage contract.

2. Divorces dissolving the marriage contract by reason of the defendant's misdoings; this is called an absolute divorce from the bonds of matrimony (a *vinculo*).

3. Divorces from bed and board (a *mensa et thoro*), being a partial divorce granted in some jurisdictions for the less heinous offenses against marital duty.

Sec. 332. SAME SUBJECT—DIVORCES OF NULLITY.—A divorce of nullity is a judicial decree that a supposed marriage never had any valid legal existence. Its purpose is one of expediency and desirability in having a void or voidable marriage determined by judicial authority. (2 Johns., Ch. 343.) The grounds or causes of granting a divorce of nullity are: a former marriage undissolved, fraud, impotence, mental incapacity, and lack of age. These causes have been considered in our first chapter. A marriage with these defects is usually valid until declared void, and offspring are legitimate. (*Birdzell v. Birdzell*, 33 Kans., 433). But if the marriage is void *ab initio* the court will still render a decree of nullity. (*Waymire v. Jetmore*, 22 O. St., 271.)

Sec. 333. SAME SUBJECT—DIVORCES ABSOLUTE OR "A VINCULO."—The chief cause for granting an absolute divorce is adultery, which Schouler defines as "voluntary sexual intercourse of either married party with some one, married or single, of the opposite sex, other than the offender's own

spouse." (D. Rel., Sec. 220b.) The only State not recognizing this as a cause for divorce is South Carolina, which State aims to make the marriage contract terminable by death alone.

But adultery is not the only cause for which an absolute divorce is granted. Each State is at liberty to determine upon what grounds divorces shall be granted, and having done so and obtained jurisdiction of the parties, its action is valid in all other States, however slight the grounds have been made. Thus, in States not granting partial divorces additional causes of divorce are given as: Extreme cruelty, gross neglect of duty, habitual drunkenness for a period of years, willful absence for a specified period of years from one to five, failure to support when able, conviction of felony or other infamous crime. (See divorce statutes in Ohio, Colorado, South Dakota and other States.)

In all jurisdictions the chief causes for divorce are: Adultery, cruelty and desertion, the other specified causes being modifications of these. (Schoul., Dom. Rel., Sec. 220b, and note.)

Sec. 334. SAME SUBJECT—PARTIAL DIVORCES.—A partial or limited divorce from bed and board is yet granted in some States. The common law did not allow this divorce to the husband. (Van Veghten v. Van Veghten, 4 Johns., Ch. 501.)

New York, which grants an absolute divorce only in case of adultery, grants this partial divorce for a limited time or for life for the following causes: 1. Cruel and inhuman treatment; 2, such conduct on the

part of the defendant as will render it unsafe for the plaintiff to live or cohabit with defendant; 3, abandonment of plaintiff by defendant, or neglect of the husband to provide for the wife. This is also regulated by statutes in the various States. But in general any conduct in one of the parties which, to the reasonable apprehension of the other, renders cohabitation physically unsafe to a degree justifying a withdrawal therefrom, is a good cause. (*Evans v. Evans*, 1 Hag. Con., 310; Bish. M. & D., 153.)

Sec. 335. DEFENSES TO A SUIT FOR DIVORCE.—Quite uniformly the statutes require the causes upon which the divorce is granted to be made out by other evidence than that of the injured party, and this whether the defendant contests or not. So a suit for divorce may be defeated because of the connivance or collusion of the parties, or by showing that the specified offense has been condoned by the complaining party, or by recriminating the plaintiff.

1. Connivance is the corrupt consent of a party to the conduct of the defendant, of which he or she afterwards complains. The libellant or plaintiff desires and intends, or at least is willing that the other party should err. When this corrupt intention appears on both sides the divorce will be refused, as it is only to be granted for cause and not by the consent of the parties. (140 Mass., 530.) But connivance at one act is not a bar to a divorce for a previous act. (142 Mass., 363.)

2. Collusion in marital law is an agreement between

husband and wife for one of them to commit, or appear to commit, a breach of the marital duty in order that the other may obtain the legal remedy of divorce or separation as for the real injury. This collusion may be either active or passive. Active, as where one party agrees to commit an offense to give grounds for a divorce. (L. R. I. Pro. Div., 121.) Passive, as where the libellee agrees to suppress facts which might constitute a good cause of defense. (3 Hag. Ec., 76.) Where such collusion of the parties can be shown it is a bar to divorce.

3. Condonation is the conditional forgiveness or remission by the husband or wife of a marital offense which the other has committed. This forgiveness is construed to be upon the condition of being ever afterwards treated with conjugal fidelity, and hence, while a complete defense to past acts, a subsequent breach by the party revives the original remedy. (2 Bish., M. & D., 269.) Condonation may be express or implied from the subsequent cohabiting of the parties. But a single act of intercourse, or a limited return home may not be enough to condone the offense. (27 Wis., 252.) And the remission must be made and accepted with the intention of conforming to the conditions. (29 Ga., 718.) The husband or wife must have knowledge of the act condoned, and the forgiveness must be free and not obtained by fraud or false promises. (73 Ill., 497.)

4. Recrimination is a counter charge by the libellee or defendant of a cause for divorce against the li-

bellant. The rule being that where both parties are in default neither can obtain a divorce. (124 Mass., 395; 72 N. C., 530.) The recrimination must be in kind to be a defense in some jurisdictions. (Terhune v. Terhune, 40 How. Pr., 258.) And in the absence of statutes it can be no defense to a cause for a nullity of marriage only. (2 Bish., M. & D., 77; Schoul., Hus. & Wife, Secs. 533-556.)

Sec. 336. EFFECT OF DIVORCE.—The effect of a valid and complete decree of dissolution, or absolute divorce, upon the property rights of the parties is substantially that of death, or, rather, annihilation. (Schoul., D. Rel., Sec. 221.) And unless statutes prescribe a division of the property, or a decree of alimony is rendered, the guilt or innocence of either spouse does not affect the case. The divorce bars dower and courtesy, right of administration, and property rights under the statutes of distribution. Local codes usually save certain rights to the guiltless party. (Jordan v. Clark, 81 Ill., 465; Hunt v. Thompson, 61 Mo., 148; Rev. Stat. Ohio, Secs. 5699, 5700; 111 U. S., 523.)

A partial divorce from bed and board with provision for the payment of a gross sum as alimony does not bar dower (Taylor v. Taylor, 93 N. C., 418); but where both remarry a decree in favor of the wife with provision for permanent alimony, bars dower. (Tatro v. Tatro, 18 Nebr., 395; S. C., 53 Am. Rep., 820.)

Sec. 337. ALIMONY.—Alimony, in divorce law, is the means of support which the court compels the

offending party to give the other spouse. It may be given temporarily or permanently, and before or after a final decree. Permanent alimony may be enlarged or diminished by decree, and may continue after the death of the offending party. (77 Me., 373.) If the wife granted alimony remarries the court may revoke or reduce her alimony. (Beadleston v. Beadleston, 103 N. Y., 57.) By statute, provision is made for securing a decree for alimony, though no divorce is sought, and the grounds for granting it are specifically stated. (Rev. Stat. Ohio, 5702; *Graves v. Graves*, 36 Ia., 310.)

Sec. 338. VOID DIVORCES.—Divorces may be impeached for want of jurisdiction, since a divorce in a foreign jurisdiction against a party not resident there, and not personally served with process, and who has not appeared, is void. (*People v. Baker*, 76 N. Y., 78; *Roth v. Roth*, 104 Ind., 35; *Hoffman v. Hoffman*, 46 N. Y., 30.) So an absolute divorce secured by fraud is void. (108 Mass., 590.) Only the parties can question the divorce, and even the children are not permitted to inquire into them. (*Baugh v. Baugh*, 35 Mich., 59.)*

*In the present work many things found in other books have been omitted, partly to reduce the size of this book, partly because this subject is one regulated largely by statute in the different States, and as it is impossible to give them all in detail, only the general principles have been presented. The student is referred to the statutes and decisions in his particular State for local law.

PART II.

PARENT AND CHILD.

CHAPTER I.

Sec. 339. PARENT AND CHILD AS A DOMESTIC RELATION.—The second of the domestic relations is that of parent and child, and, as a legal topic, consists of those natural and legal rules which fix and govern the respective rights and duties between parents and their offspring. It is the most universal relation in nature, observes Blackstone, and immediately derived from that of husband and wife. (1 Bl. Com., 446.)

Sec. 340. LEGITIMATE AND ILLEGITIMATE CHILDREN.—All children are not born in lawful wedlock, and the law which aimed to protect another legal relation, that of marriage, did not scruple to deprive offspring born out of wedlock of all their natural rights. Hence children at common law, and now, are either legitimate or illegitimate, and the relation of parent and child, which by law of nature and reason should apply equally to these two sorts of children, as a matter of law does not, as we shall see. But first of legitimate children.

A legitimate child at the common law is one who is born in lawful wedlock, or within a competent time

afterwards. (1 Bl. Com., 446.) The presumption being that all children born to married parents were legitimate, which presumption might at first be rebutted only by proving the impotency of the husband or his absence from the realm, but later by the fact of the non-access of the husband. (Pendrell v. Pendrell, Stra. Rep., 925; 2 Kent. Com., 211.) At the civil law the parents of a bastard child by subsequently marrying legitimated the child, and this is the law in some American States (Schoul., Dom. Rel., Sec. 226n), but was not the common law, nor is it the law of England now, or of some States.

The domicile of a legitimate child is determined by and follows that of its father. (Van Matre v. Sankey, 148 Ill., 536.)

Sec. 341. ADOPTION.—By adoption is meant the taking or choosing of another's child as one's own. It was recognized by the civil law, but not by the common law. In some States it is recognized, and the local laws point out the method to be followed. In some States a written instrument must be executed and recorded, and the proceedings are in the nature of a solemn contract. (Long v. Hewitt, 44 Iowa, 363.) The Massachusetts statutes provide that, by a judicial decree rendered upon due investigation, any person may adopt as his own the child of others; and the child so adopted shall be deemed for the purposes of inheritance and all other legal consequences, the child of the parents by adoption, the same as if born to them in lawful wedlock. (Mass. Gen. Sts., c. 110.) And such

a statute is not unconstitutional unless interfering with vested rights. (*Sewall v. Roberts*, 115 Mass., 262.; *Eckford v. Knox*, 67 Tex., 200; *Schoul.*, Dom. Rel., Sec. 232; Rev. Stat. Ohio, Secs. 3137-3140.)

Sec. 342. DUTIES OF PARENTS.—The duties of parents to their legitimate children, Blackstone observes, consists in the three particulars of maintenance, protection and education. (1 Bl. Com., 446.) In the absence of statute, protection and education are duties permitted rather than enforced. The legal duty of the parent as required by statutes is usually that of support.

1. Maintenance or Support.—This duty is a principle of natural law. An obligation laid on the parents not only by nature herself, but by their own proper act in bringing children into the world. By begetting them they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. Hence the children have the perfect right of receiving maintenance from their parents. (1 Bl. Com., 447.) But this duty, which the natural instinct of affection prompts the parents to perform voluntarily, has also been enforced by the municipal law of all well-regulated States. The civil and the common law recognized this duty and enforced it by appropriate sanctions. (*Mortimore v. Wright*, 6 M. & W., 482.) And modern State statutes impose the same obligation and make its neglect a misdemeanor. (Rev. Stat. Ohio, Sec. 3140-2.)

But the obligation is qualified when the child is able to assist in providing for itself, or where the child has property of its own and the father has not. And in the latter case a court of equity may provide for the child out of the child's property, and allow the parent expenses incurred by him for the child. (2 Story's Eq., Sec. 1354.) Otherwise the parent is bound to maintain his children until they reach the age of majority. (2 Kent. Com., 192.)

Blackstone thus states the limitation on the duty of parent to support his children: "No person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease or accident, and then is only obligated to find them with necessaries, the penalty on refusal being no more than 20s. a month."* And this in general is the effect of our modern statutes, which seek only to compel the parent to provide for blind, lame, or impotent offspring, or until the child is able to provide its own support. (Schoul., Dom. Rel., Sec. 236; 2 Kent. Com., 190.)

The stepfather is not bound to support his step-child unless he is taken into the home and provided for

*1. Bl. Com., 449. And in the same connection he says: "For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence; but thought it unjust to oblige the parent against his will, to provide them with superfluities, and other indulgences of fortune, imagining they might trust to the impulse of nature if the children were deserving of such favors." (Idem.)

and accepted practically as one of the family. (Smith v. Rodgers, 24 Kans., 140.)

After the father's death or in case of his disability the mother is bound to support the children if able. (Dedham v. Natick, 16 Mass., 140.) But if the child has property, such property will be used without calling on the mother. (Pierce v. Pierce, 64 Wis., 72 S. C.; 54 Am. Rep., 581.)

2. Protection.—A parent is permitted rather than enforced in regard to this duty. The law permits the parent to uphold children in their law suits without being guilty of the legal crime of maintaining quarrels, and justifies an assault and battery committed in defense of the persons of one's children. (1 Bl. Com., 450.)

3. Education.—This, too, is a moral rather than a legal duty. Compulsory education has not prevailed in this country, and where tried has not been kept up. The parent would doubtless be compelled to permit minor children to attend school where the law required their attendance. The question of education may arise under the father's will providing for it, and will be followed as prescribed. Where the question arises as to the child's religious training after the death of the parent, the last will may control, or the court may decide as it deems best for the interests of the children. (Schoul., D. Rel., Sec. 235.) A reasonable education may be regarded as a necessary, but such an education does not include a trade or profession, or the so-called higher education. (Turner v. Gaither, 82 N. C., 357; 16 Vt., 683; 47 Ill., 290.) See post., Sec. 379.

Sec. 343. THE CHILD AS AGENT OF THE PARENT.—The father is not bound for the debts or contracts of his child in the absence of an express or implied authority given the child. (*Cromwell v. Benjamin*, 41 Barb., 558.) But very slight circumstances may raise the implied assent of the parent. (*Bradford v. Bradford*, 32 Ill. App., 461.) The father is compelled to discharge his legal and moral obligations as a parent, and must provide suitable necessities for his minor children, but is not to be bound by every act of an imprudent child. Where the infant resides at home and is properly supplied by the father, a person furnishing the child necessities cannot bind the father unless he authorized the purchase. (*Clinton v. Rowland*, 24 Barb., 634.) The parent's contract, or failure to supply the infant, must appear if he is to be bound. (159 Pa. St., 489.) Where the father knows the circumstances of the child's contract and makes no objection he will be bound, as where he knew that another was boarding his minor child with expectation of reward. (*Clark v. Clark*, 46 Conn., 586; *Swain v. Tyler*, 26 Vt., 9.) In *Mortimer v. Wright*, 6 M. & W., 482, it is said, that "in point of law a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a brother, or an uncle, or a mere stranger would be." And in general the child has no authority to bind the father as his agent unless an express authority is given or to be legally inferred, and the dealer supplying the goods must see, at his peril, that the goods supplied are necessities according to the situation and condition of

the infant. (*Gotts v. Clark*, 78 Ill., 229.) At majority the child is presumed to supply his own necessities, and though the son still live with the father, and the goods are supplied at the request of the father, the son alone is bound. (*Boyd v. Sappington*, 4 Watts, 247.) And a child to be able to bind a parent while from home for necessities supplied him must not have left against the wishes of the parent. (*Raymond v. Loyd*, 10 Barb., 485.) A parent is usually held liable for the expense of a decent burial of a deceased minor child. (*Sullivan v. Horner*, 41 N. J. Eq., 299.)

Sec. 344. RIGHTS OF THE PARENTS.—The power of parents over their children, according to Blackstone, is derived from and incident to their duty. The power being given, partly to enable the parent more effectually to perform his duty, and partly as a recompense for the care and trouble incident to a proper discharge of it. (1 Bl. Com., 452.) The parent's power includes the right to correct the child, the right to his custody, and to receive his earnings and services.

Sec. 345. SAME SUBJECT—CORRECTION.—At the ancient Roman law the father had the power of life and death over his children, upon the principle that he who gave had the right to take away. The English common law, while recognizing the power of the parent to correct the child, reduced the power to that sufficient to keep the child in order and obedience. Thus the father may lawfully chastise a child in a reasonable manner. (1 Bl. Com., 452; Van Valkenburg

v. Watson, 13 Johns., 480.) The parent is responsible for the abuse of the right, and may be indicted and found guilty of manslaughter, or even murder, in a proper case. (Queen v. Edwards, 8 Car. & P., 611; Fletcher v. People, 52 Ill., 395.)

Sec. 346. SAME SUBJECT—CUSTODY OF THE CHILD.—The father has the primary right to the custody of his children, and on his death may appoint a guardian, but the mother generally succeeds to the natural rights of the father. (People v. Olmstead, 27 Barb., 9.) And this was a plain principle of the common law, that the father possessed the paramount right to the custody and control of his minor children, and to superintend their education and nurture. (1 Bl. Com., 453.) If the father is shown unfit, he may be deprived of the custody of his child, and the court will appoint a guardian or transfer it to the mother. (13 Johns., 418.) So the court may deprive both parents of the custody if the interests of the child demands. (2 Kent. Com., 205.)

In case of the divorce of the parents the court granting the decree usually awards temporary custody of the children while the suit is pending, and permanent custody upon final decree to the parent most able and fit to provide for the child, or the court may ignore the parents and provide a guardian for the children. (2 Bish., M. & D., Secs. 526, 530; Bryon v. Lyon, 104 Md., 227; In re Bort, 25 Kans., 306.) The tendency is to treat the parents equally in regard to their rights to the custody of the children. (Schoul., Dom. Rel., Sec.

249n.) The wishes of the child may also be consulted if he is of years of discretion.

Parents may relinquish their right to custody by a contract of apprenticeship, or by permitting the child to be adopted by others. So, where a child has been surrendered to a third person or relatives, and been supported by them, if in the interest of the child, the court will not award custody to the parents. (Browne, Dom. Rel., 78.)

Proceedings in regard to custody of children are usually conducted by the writ of habeas corpus, but as the writ is for the purpose of inquiring into an illegal restraint and of freeing the person from it, the court is not bound to decide who is entitled to the guardianship or deliver the child to the custody of any particular person, but in its discretion it may do so. (Schoul., Dom. Rel., Sec. 249, and cases cited.)

Sec. 347. SAME SUBJECT—SERVICES AND EARNINGS.—The parent is entitled to his child's services and earnings until he is of age, unless he emancipates the child and compels him to support himself. (1 Bl. Com., 453; *Gale v. Parrot*, 1 N. H., 28; *Hall v. Hall*, 44 N. H., 293.) After coming of age the child is entitled to his wages and earnings, but if he remains with the father wages cannot be recovered in the absence of a special agreement. (15 Barb., 444.) The right of action to recover for the services of the minor is presumed in the parent. (*Dufield v. Cross*, 12 Ill., 397.) And the father may charge for services rendered by his son as though his own work. (Brown

v. Ramsay, 5 Dutch., 117.) So a minor child hired under an agreement with the father cannot be discharged and rehired under a new contract, without the notice of the parent. And where this is done the parent may adopt the new contract and claim what is due, or repudiate it, and claim the value of the child's services. (Sherlock v. Kimmel, 75 Mo., 77.)

The parent may voluntarily relinquish his right to his child's earnings and services, and this will not be in fraud of creditors, if done in good faith, though the father be insolvent. (Wilson v. McMillan, 62 Ga., 16.) This relinquishment is called Emancipation. So a parent may by delay and laches forfeit the right of action for his son's wages, as where the minor is working for a monthly wage to be paid to himself, and the father, knowing of the agreement, gives no notice of his objection until the work is done and payment made to the child. (Smith v. Smith, 30 Conn., 111.)

Payment of wages to a minor son, where he is known by his employer to have been less than twenty-one at the time of making the contract, furnishes no defense to an action by the father, who had no knowledge of his hiring until the wages were earned. (White v. Henry, 24 Me., 531.) But the pay, bounty and prize-money of minors enlisted in the army or navy of the United States are held to belong to the infant, as the contract is personal. (Cadwell v. Sherman, 145 Ill., 348; Schoul., Dom. Rel., Sec. 252a.)

A widow is entitled to the wages and services of her minor child if not emancipated or under the control of a guardian. (Hammond v. Corbett, 50 N. H., 501.)

But not after her remarriage. (*Williams v. Hutchinson*, 5 Barb., 122.)

The right does not extend to stepchildren, and where they are voluntarily supported the stepfather cannot claim their earnings, nor on the other hand can they recover from him for services rendered. (*Smith v. Rodgers*, 24 Kans., 140; *Browne*, Dom. Rel., 80.)

Sec. 348. THE CHILD'S PROPERTY.—As a general rule the parent has no right to the child's separate property or real estate. But clothing and other articles given the child by the parent is the property of the parent. (*Prentice v. Decker*, 49 Barb., 2.)

Usually, where gifts, legacies, distributive shares, and the like, come to a minor child, as his own property, a guardian is appointed to hold and manage it during his minority. (*Keeler v. Fassett*, 21 Vt., 539.) And under no pretext may the father appropriate such funds to himself, or to pay his debts. And a payment of such funds by the personal representative or trustee to the father makes such person responsible for its repayment to the child. (*Perry v. Carmichael*, 95 Ill., 519.) And the same protection is afforded the child's lands. (*Guynn v. McCauley*, 32 Ark., 97.) The parent is called the natural guardian of the child, but this gives no right to control or manage the child's separate property. (*Schoul.*, Dom. Rel., Sec. 255.)

Sec. 349. PARENT'S RIGHT OF ACTION FOR INJURIES TO CHILD.—The parent has a right of action for expenses and loss of services of the child caused by the negligence or wrongful act of another.

(*Hatfield v. Roper*, 21 Wend., 615.) The action being founded on the loss of service, the English courts hold that for an injury to a child too young to be of service the action would not lie. (*Hall v. Hollander*, 4 B. & C., 660.) But the rule is more liberal in this country, and while it is doubtful if the father can be deprived of his right to sue for loss of services on account of child's youth, it is held that the expenses to which the parent is put may be recovered. (*Dennis v. Clark*, 2 Cush., 347; *Sykes v. Lawlor*, 49 Cal., 236.) The father being dead, the mother may maintain the action. (*County Com. v. Hamilton*, 60 Md., 340.) The recovery may extend to and cover a prospective loss of service. (*Drew v. Railroad*, 26 N. Y., 49.)

The child may be living with and in the service of another, and if the parent has not relinquished the right to its service the action lies. (*Arnold v. Norton*, 25 Conn., 92.) The culpable negligence of the parent always defeats or forfeits his right of action. (*Smith v. Railway*, 92 Pa. St., 450; 21 Wend., 615.)

The parent has an action for the enticing away or abducting of a child, or for the seduction of a daughter. The recovery here is also based on a loss of service, and injury to the child will not suffice, but the service need only be slight. (*Vassal v. Cole*, 10 Mo., 634; *Kennedy v. Shea*, 110 Mass., 147; *Browne*, Dom. Rel., 82-3.) The action of seduction may be maintained by the mother after the father's death, if the daughter was actually in her service. (*Davidson v. Abbott*, 52 Vt., 570.) And the action may be maintained by any one standing in the parent's place. The

damage when recovered for seduction is not restricted to the loss of service, but may include distress of mind and loss of society. (Browne, Dom. Rel., 84.)

By the common law the parent had no right of action for an injury causing the instantaneous death of the child, as there would be no loss of service during a lingering sickness, nor could he recover burial expenses. (Osborn v. Gillett, L. R. 8 Ex., 88.) But State statutes have remedied this too technical rule of the common law by allowing the parent to recover for the loss of a child caused by the negligence of others. (121 Mo., 227; 95 Cal., 510.)

Sec. 350. PARENT'S LIABILITY FOR CHILD' TORTS.—The parent is not liable in damages for the torts or wrongs of his child committed without his knowledge, consent, participation or sanction, and not in the course of his employment of the child. (Schoul., Dom. Rel., Sec. 263.)

A Pennsylvania case holds the parent responsible for an act done by the son when they ride together, and the act is committed in the father's presence. (Strohl v. Levan, 39 Pa. St., 177.) But in Missouri the father was not held responsible for an independent assault committed by his infant son, without his sanction. (Baker v. Haldeman, 24 Mo., 219.) But if it can be shown that the father participated in or sanctioned the wrong he may become liable (Hoverson v. Noker, 60 Wis., 511.) And the parent is liable for the child's negligence in his service. (Teagarden v. Powers, 66 Cal., 368.)

The infant is answerable for his torts out of his own estate if old enough to have known better than to have done the wrong. (*Campbell v. Stakes*, 3 Wend., 137; 45 Kans., 423.)

If the tort is committed while the child is acting as the agent of the father, the rule as to the liability of a principal applies. (86 Ind., 476.)

Sec. 351. DUTIES OF CHILDREN.—The moral duty of the child to the parents is to honor and obey them. The common law did not impose the obligation of support. (*Edwards v. Davis*, 16 Johns., 281; 2 Kent. Com., 207.) The imperfect obligation of the child to support aged and indigent parents has been remedied by statute in most States, which require the children to support them if able to do so. (Schoul., Dom. Rel., Sec. 265; N. Y. Rev. Stat., p. 614.) And for necessities furnished to parents at the request of a grown child, the latter is chargeable, and he is also liable to contribute for necessities furnished by other children at his request. (45 N. H., 558; *Stone v. Stone*, 32 Conn., 142.)

Sec. 352. RIGHTS OF CHILDREN, EMANCIPATION.—The rights of children include those which we have already considered, as support, the power to bind the parent as agent, etc. Again, a father may emancipate his minor child and thus give him a right to his own earnings. This term is borrowed from the Roman law, where it referred to the formality of enfranchisement by the father. Under our law the emancipation, or freeing from parental control, may be by a

written instrument or by a parol agreement, or it may be inferred from the conduct of the parent. Its effect is to give the child the right to his own wages, the disposal of his own time, and, in a great measure, the control of his own person; and, on the other hand, to relieve the parent of all legal obligation to support. (*Nightingale v. Withington*, 15 Mass., 272.) See Schoul., Dom. Rel., Ch. 5, Part III.

Sec. 353. VOLUNTARY CONVEYANCES.—Voluntary gifts or conveyances to children are treated as in the case of husband and wife; while not favored, they will be supported if executed and not in fraud of creditors. (*Oakes v. Oakes*, 16 Ill., 106; *Brown v. Scott*, 7 Vt., 57; Schoul., Dom. Rel., Sec. 270, and cases.)

Sec. 354. ILLEGITIMATE CHILDREN.—By the common law an illegitimate child had no rights, as he was regarded as “*filius nullius*.” A bastard was incapable of being heir to any one; could have no heirs save of his own body, and could have no surname save by reputation. (1 Bl. Com., 459.)*

Statutes have modified the common law doctrine, and the mother and the bastard child can mutually in-

*This harsh rule of the common law was not from any excess of virtue in the lawgivers of that day, but a part of the settled principles of the aristocracy to prevent their licentiousness from having any effect upon the monopoly of property which they sought to establish and perpetuate. No matter how many illegitimate children the great lord might have, his estate vested by law in a single legitimate male heir, and thus was the supremacy of an hereditary aristocracy made permanent.

herit. (Stimson, Stat. Law, Secs. 3151-4.) So by statute it is provided in some States that if the parents of illegitimate children afterwards marry the children become legitimate. Also by statute the father may render an illegitimate child legitimate by receiving it into the family and treating it as a legitimate child. (Schoul., Dom. Rel., Sec. 226n.)

The mother is ordinarily obliged to maintain an illegitimate child. But now in most States a method is provided whereby the declared father may be compelled to provide for his illegitimate child.

In most States the illegitimate children inherit the mother's estate share and share alike with the legitimate children. (Stimson, Sec. 3151.) If the illegitimate child has children they inherit as if the parent were legitimate. If an illegitimate person dies intestate without issue, the estate goes to the surviving husband or wife, and if unmarried to the mother or next of kin. (Stimson, Sec. 3154.)

PART III.

GUARDIAN AND WARD.

CHAPTER I.

Sec. 355. PERSONS IN LOCO PARENTIS.—Sometimes it is necessary for the law to accept or designate a person to act for or in place of a parent, in the care, custody and control of infants, or of persons incapacitated to care for themselves. Such persons, as regards their general rights and duties, are said to be “in loco parentis,” that is, a parent for the time being. Thus the relation of guardian and ward, Blackstone observes, bears a near resemblance to that of parent and child, and is plainly derived from it; the guardian being only a temporary parent, that is, for so long a time as the ward is an infant, or under age. (1 Bl. Com., 460.) So the instructor or teacher who has the care of the minor’s education and instruction, is said to stand in loco parentis, and to have the power to restrain and correct the pupil to the extent that may be necessary to answer the purpose for which he is employed. (1 Bl. Com., 453.)*

Sec. 356. GUARDIANSHIP DEFINED.—Guardianship arises when one person is entrusted by law with the interests of another, who from youth, inexpe-

*See Post, Sec. 372.

rience, mental weakness or other cause is disqualified from acting for himself. The person so entrusted is called the "guardian," and the individual whose person or property is entrusted to the guardian is called the "ward."

Sec. 357. GUARDIANSHIP AT COMMON LAW.—At common law there were a variety of guardianships which are now obsolete, or are replaced by statutory enactments, or changed by the form of our institutions. (2 Kent. Com., 221.) Blackstone mentions three species of guardians recognized by the common law, as, guardians by nature, guardians for nurture, and guardians in socage. (1 Bl. Com., 461.) The parents were the natural guardians; first the father and then the mother. The parents were also the guardians for nurture, and this applied to the children who by the English law were not to be heirs; it continued until the child reached the age of fourteen. If there were no parents a discreet person was assigned to maintain and educate the infant. Guardianship in socage arose where the minor was entitled to an estate in lands, and the policy of the common law demanded that the guardianship should be entrusted to the next of kin incapable of inheriting from the ward, to remove the temptation for the guardian to abuse the trust. The guardian in socage retained possession of the ward's property until he attained the age of fourteen, when he could choose his own guardian.

By 12 Car. 2, c. 24, the father might appoint a testamentary guardian for the person and property of his

minor children until they attain the age of twenty-one. (1 Bl. Com., 462.)

The lord chancellor as the delegated agent of the king was recognized as the general and supreme guardian of all infants, as well as idiots and lunatics. Guardians might act on the advice and direction of the chancellor in dealing with their ward's estate, and were responsible to the court of chancery for any abuse of their trust, and might be removed by such court. (1 Bl. Com., 463.)

Sec. 358. GUARDIANSHIP IN THE UNITED STATES.—The common law relating to guardianship has been largely replaced by legislation in the various States of the Union. And the whole subject is controlled in a great measure by local statutes. There are fewer kinds of guardians, and outside of guardianship by nature, or the parental right of custody of the child's person, when not unfit, the common law is entirely superseded. (Schoul., Dom. Rel., Sec. 290.) We have testamentary guardians, and chancery or probate guardians, but the distinction lies in the method of appointment and not otherwise. There is a distinction between the various courts known as probate, orphans', ordinary's and surrogate's, and the chancery courts. While the former have been vested with jurisdiction to appoint guardians, and to exercise a control over them similar to that exercised by the court of chancery in England, and sometimes to the exclusion of the chancery courts, yet unless the terms are exclusive the court of chancery still retains its general supervision. (Mat-

ter of Andrews, 1 Johns., Ch. 99;* Rev. Stat. Ohio Tit., II., Ch. 3.)

Sec. 359. SAME SUBJECT—THE PARENTS AS NATURAL GUARDIANS.—Quite generally the father, and on his death the mother, is regarded as the natural guardian of the person of the ward, but neither parent is recognized as the guardian of the property coming to the child by gift, devise, etc., unless so appointed by a court of competent jurisdiction. (1 Johns., Ch. 3; Schoul., Dom. Rel., Sec. 298.)

Sec. 360. APPOINTMENT OF GUARDIANS.—Guardians derive their authority either from the law, as in the case of natural guardians, or from a special appointment. The special appointment may be by the parent, by the infant himself, or by a competent court.

The legal authority of the parent to the custody of minor children we have already noticed under the head of parent and child. But at the death of the parents the next of kin do not succeed to their right of natural guardianship. The mother of a bastard child is its

*Schouler explains the origin of probate and other special courts with partial chancery jurisdiction, by the fact that at the origin of our country the ecclesiastical or spiritual courts had charge of testamentary matters and the control of orphans and their estate. Our system necessitated special courts with probate jurisdiction, as the church had been denied authority in temporal matters. Later a prejudice to the expensive chancery proceedings of England caused these courts to be given jurisdiction of equity matters also, and now their power has become so fixed as to oust, in some cases, the chancery courts. (Dom. Rel., Sec. 291.)

natural guardian and not the putative father. (*Wright v. Wright*, 2 Mass., 109; 2 Kent. Com., 223.)

Sec. 360. SAME SUBJECT—APPOINTMENT BY THE PARENT.—A father or mother may, by a written instrument, usually a deed or will, appoint a guardian for the person or property, or both, of his or her minor children. This is called testamentary guardianship, and at the old law guardians thus appointed needed no further qualification, not even the probate of the will appointing them. But as testamentary guardianship is now regulated by the local statutes, and as these usually require a decree confirming the appointment, the older rule is superseded. Usually before confirming such an appointment the court requires that sureties be furnished, unless exempted by the appointment. (*Wadsworth v. Connell*, 104 Ill., 269.) A parol appointment is insufficient.

A testator cannot appoint a testamentary guardian except to his own children; but an attempt to appoint one for others may create a trust. (*Camp v. Pittman*, 90 N. C., 615.) A firm cannot be made a testamentary guardian, nor a corporation formerly, but certain financial corporations are now chartered with power to assume fiduciary trusts. (*Rice's Case*, 42 Mich., 528; Schoul., Dom. Rel., 5th ed., Sec. 301.)

Sec. 361. SAME SUBJECT—APPOINTMENT BY THE COURT.—The appointment of a guardian solely by the infant himself, as at common law when the infant at fourteen chose to supersede a guardian in socage by one of his own choosing, is not now permit-

ted. Infants have still the privilege of selecting a guardian when of this age, but the person selected must be authorized and appointed by the proper court. This is a matter of statute, and the privilege is not uniform. (*Ham v. Ham*, 15 Gratt., 74; *Dibble v. Dibble*, 8 Ind., 307; Rev. Stat. Ohio, Sec. 6257.)

If the infant is not of age to select, and no person has been appointed by the will of the parent, the court will appoint a fit person. The court is governed in its appointment by the statutes. The usual procedure is for a relative or some one interested in the appointment to petition the probate court, setting forth the facts in the case and asking the appointment of a guardian. Where the child is over fourteen years of age it may assent to the petition, and the parent or next of kin also join in the petition. And if the interested persons do not thus assent, the person petitioning must give notice to them that they may appear in court and see that the infant's interests demand the appointment of a guardian, and that a suitable person is selected. (*Taff v. Hosmer*, 14 Mich., 249.)

Before the letters of guardianship are issued the court requires the filing of a bond by the guardian to account for the property of the ward; this bond is made to correspond to the amount of the ward's personal and real property of which the guardian will have the control. (Rev. Stat. Ohio, Sec. 6259.)

Sec. 362. THE COURT APPOINTING.—As we have seen the chancery courts have been superseded in this country by the special county courts, as probate,

orphans', surrogate, etc., which usually issue the letters of guardianship under their official seal. In some States the chancery and county courts exercise concurrent jurisdiction. See Schoul., D. Rel., Sec. 303.

The court in the county of the ward's domicile has jurisdiction to appoint, and if the ward is a non-resident the court of the county in which he has property. If the property is in two or more counties the court in which the application is first made takes and retains jurisdiction. (*Danneker Case*, 67 Cal., 643; 42 Mich., 528.)

Sec. 363. WHO SHOULD BE APPOINTED GUARDIAN.—The court appointing has the widest discretion to appoint a guardian for the best interests of the child, preference being given a surviving parent, or a relative. And the court will be guided but not controlled by the wishes of the parent. (*Heinemann's Appeal*, 96 Pa. St., 112; Schoul., Dom. Rel., Secs. 304-305.) The leading consideration for the court should be the interest and welfare of the child, and this, which has become the only rule of choice as between distant kindred, may control even the selection of the father himself. (*Badenhoof v. Johnson*, 11 Nev., 87.) But local statutes may and do specify to what extent the surviving parent and next of kin are entitled to preference. (*Weldon v. Keen*, 37 N. J. Eq., 251.)

The father's informal testamentary appointment may control the court, or his deathbed wishes; also that of the mother in States which recognize her right of choice. (Schoul., Dom. Rel., Sec. 305; *Matter of Marcellin*, 31 N. Y. Supr., 207.)

Sec. 364. RIGHTS AND DUTIES OF GUARDIAN.—Subject to the regulation of the court, a guardian of the person of a ward is entitled to the custody of his ward not only as against the wishes of near relatives, but also as against the wishes of a parent. (Senseman's Appeal, 21 Pa. St., 331; 31 Me., 196.) The rights of a guardian may be restrained by an order of court to conform to the best interests of the child.

The guardian may change the domicile of the ward, within the State, but a prejudicial removal of the ward from the State may be restrained. (2 Kent. Com., 227; *Wilcox v. Wilcox*, 14 N. Y., 575.) The parent as guardian has more authority to change the domicile. The guardian may select the place of the ward's education, and may protect him from improper associates. (*Wood v. Gale*, 10 N. H., 247.) The guardian has no right to the ward's services, and cannot maintain an action for the seduction of a female ward. (*Blanchard v. Ilsley*, 120 Mass., 487.)

Sec. 365. SAME SUBJECT—DUTIES AS TO THE PERSON.—The guardian's duties are those of the parent, protection, education, and maintenance. But his duty differs in this that he is bound to maintain the ward only to the extent of the ward's own estate. If there is no estate the ward must be put to work, or, if too young, may be entrusted to a charitable institution. (*Browne, D. Rel.*, 95.) The guardian may bind himself for the ward's maintenance if he fails to limit the liability to the property in his hands. (*Hutchinson v. Hutchinson*, 19 Vt., 437.) The

father as guardian cannot use the child's income or principal, save by authority of court, as ordinarily it is his duty as parent to support the child.

Sec. 366. SAME SUBJECT—AS TO THE WARD'S PROPERTY.—The guardian's trust is one of obligation and duty, and not of speculation and profit. (2 Kent. Com., 229.) The guardian obligates himself to conform to the power of his appointment, and carry out the duties he assumes with the same prudence, care and diligence which a good business man would use in the management of his own property. The ward's interest being the constant consideration of the chancery court, it is held that unauthorized acts of the guardian may be sanctioned if they redound to the ward's benefit; but for unauthorized acts which cause a loss, the guardian is amenable. (Schoul., Dom. Rel., Sec. 341.)

As a general rule the guardian can expend no more than the income of his ward's estate without the sanction of the court. (State v. Clark, 16 Ind., 97.) The order in which the ward's property is to be supplied to his maintenance is, first, the interest or income, next, the personalty, and, last, if necessary, the real estate. But the real property is never to be sold unless necessary for maintenance, and then by the order of the court. (Strong v. Moe, 8 Allen, 125.) The guardian is allowed a liberal discretion in expenditures for the ward's maintenance and education, if he does not encroach upon the ward's capital. (Karney v. Vale, 56 Ind., 542; Chubb v. Bradley, 58 Mich., 268.)

The guardian may render himself liable by acts of negligence in dealing with ward's property, and the proper way in case of doubt is for him to seek the advice of the court and be governed by it. (112 U. S., 452.) He should not mingle his ward's money with his own or use it in his own profit. (State v. Sanders, 62 Ind., 562.) The guardian cannot make profit by buying the property of the ward, nor by selling his property to the ward. (Lane v. Taylor, 40 Ind., 495; Bostwick v. Atkins, 3 N. Y., 53.)

Within a reasonable time after his appointment the guardian should set aside a reasonable sum for his ward's current expenses, and the balance he should safely invest for the benefit of the ward. He cannot long suffer his ward's money to be unproductive, and if he does he becomes chargeable with interest. (Mackin v. Morse, 130 Mass., 439.) And for fraud or positive misconduct in the management of the ward's money he may be chargeable with compound interest. (Stark v. Gamble, 43 N. H., 465; 57 Wis., 104; Rev. Stat. Ohio, Sec. 6269.)

In some States it is provided by statute in what securities the guardian may invest his ward's funds; but in general all public securities, like State or National bonds, are to be preferred. And real estate security is preferred to investment in railroad stock. (Worrell's Appeal, 23 Pa. St., 44.) Small sums of money may be deposited in a savings bank. In case of doubt as to proper securities the prudent course is to petition the court for direction, and then act strictly as directed. (3 Md. Ch., 306.) Where the statute prescribes the se-

curity it should be followed. (103 Ill., 142; Rev. Stat. Ohio, 6269.)

Sec. 367. SAME SUBJECT—SALE OF REAL ESTATE BY GUARDIAN.—The guardian cannot sell the ward's real estate without an order of court. The proceeding is, usually: 1, To petition the court for a license to sell, stating the reason for so doing, which is the insufficiency of the ward's other property; 2, filing a bond with the court to account for the proceeds of the sale; 3, sell as directed by the court, at public or private sale; 4, execution and delivery of deeds by the guardian and ward, without covenants; 5, properly apply the proceeds as ordered by the court, and this may include the re-investment of a surplus fund, after the payment of debts and providing for the support of the child. (*Shanks v. Seamonds*, 24 Iowa, 131; *Schoul.*, Dom. Rel., Sec. 360.) The guardian cannot bind his ward by any covenants of warranty in the deed, but he may bind himself. The deed has the effect of a quitclaim of the ward's interest. (*State v. Clark*, 28 Ind., 138; *Byrd v. Tirpin*, 62 Ga., 591.)

Sec. 368. GUARDIAN'S ACCOUNTS.—The guardian is required to account to the court appointing him, from time to time, as to the condition of the ward's estate. The first account shows the extent of the ward's property, and intermediate accounts though required are not conclusive though judicially approved. They serve to keep the court informed of the general condition of the trust fund, and whether or not the guardian's bond should be increased, but they may be

inquired into afterwards. At the expiration of the trust the guardian is required to file a final account, and in this account all previous accounts may be examined by the court to determine the fairness of his management of the ward's estate. When the final account has been examined and approved by the court, and not reversed on appeal, the account, as well as those which preceded it, concludes all parties interested, and may not be reopened or annulled in any court. But in some States it might be set aside for fraud or manifest error. (Schoul., Dom. Rel., Sec. 372; *Cummings v. Cummings*, 128 Mass., 532.)

Sec. 369. TERMINATION OF THE GUARDIAN'S AUTHORITY.—Guardianship lasts until the end of the period for which it was instituted, but it may be sooner terminated by the death or marriage of the ward; and the authority of a particular guardian may be terminated by death, resignation or removal before the period has expired. Formerly a woman guardian was deprived of her authority at marriage, and a testamentary guardian may be appointed for a period short of minority.

Marriage of the ward terminates the power of the guardian over the ward's person, whether male or female. The property of the male ward may be retained by the guardian, regardless of the marriage.

The guardianship continues until the ward has arrived at the age of majority, unless the statute has modified the rule. The guardianship of insane persons and spendthrifts, where authorized, continues according to the ward's necessity.

The guardian may be removed at any time for abuse of his trust. The statutes prescribe the causes for which he may be removed, and these include incompetency and removal from the State. When a guardian has been removed, or the ward is of age to choose a guardian, another is appointed to supersede the one removed. (Schoul., Dom. Rel., Ch. 3, Part IV.) Natural guardians cannot resign, and probably all guardians who have once accepted must serve until released by the court. (Browne, D. Rel., 93; *ex parte Crumb*, 2 Johns., Ch. 439.)

Sec. 370. COMPENSATION OF GUARDIANS.

—In England the rule has always prevailed that the services of executors, guardians and trustees should be treated as honorary and gratuitous, chancery allowing reimbursement for necessary expenses incurred. But this rule has not been followed in the American States. The local law either prescribes a certain per centum or commission as compensation, or permits the court to fix a just and reasonable compensation. (Rev. Stat. Ohio, sec. 6288; 3 Johns., Ch. 43.)

Sec. 371. RIGHTS AND LIABILITIES OF THE WARD.

—During the guardianship the ward may restrain the guardian from committing waste, and may file an action by his next friend for an accounting. Also, when the guardianship has terminated he has an action for an account. This action must be brought in a reasonable time, as long acquiescence will debar the suit. (*Aaron v. Mendel*, 78 Ky., 427.)

The court will aid the ward to recover any property

embezzled, concealed or conveyed by the guardian in fraud of his rights. The usual proceeding is by bill in equity. The statutes in some States provide for an inquisition for the discovery of property missing from the ward's estate. (*Cobb v. Kempton*, 154 Mass., 266.)

The guardian can bind the infant within the scope of his general powers, or as authorized by the court, but actions not within his powers and prejudicial to the ward may be disaffirmed by the ward on reaching majority. This is called the infant's right of election, but the court of equity may control this privilege and pronounce a doubtful transaction by the guardian good. (*Schoul., Dom. Rel., Sec. 385.*)

A gift or conveyance from ward to guardian during or shortly after the termination of the guardianship is presumed fraudulent, and will not be sustained except on the clearest proof of good faith on the part of the guardian. And this applies to any one in loco parentis. (*Berkmeyer v. Kellerman*, 32 Ohio St., 239.) So where the guardian has taken real estate or mortgage notes in his own name but the consideration coming from the ward's estate, he will be regarded as a trustee for the ward. (*Fogler v. Buck*, 66 Me., 205.)

The infant may have a special guardian appointed to manage a suit in court; this is called a guardian ad litem.

Sec. 372. **TEACHER AND PUPIL.**—At common law education was furnished by the parent by means of private tutors or instructors, and the tutor or schoolmaster was regarded as standing in loco parentis and

with sufficient delegated power from the parent to control the pupil. (1 Bl. Com., 453.) Now the public schools are conducted by the State, and the teacher represents the State as well as the parent. For the purpose of maintaining order and decorum he has authority to enforce prompt attention to reasonable demands, and in proper cases to inflict reasonable punishment upon refractory children, and where necessary to expel a child from school. (Boyd v. State, 88 Ala., 169; 46 Vt., 452; Cooper v. McJunkin, 4 Ind., 290.) The teacher is not liable, either civilly or criminally, unless he has acted with express malice, or been guilty of such excess of punishment that malice must be implied. (Commonwealth v. Randall, 4 Gray, 38.) See Cooley, Bl. Com., 453n.

A pupil expelled from school may be reinstated by mandamus if he was not wilful or malicious in the acts for which expelled. (77 Mich., 605.) The power of the teacher extends not only to the pupil while in school, but also to control acts of the pupil reasonably identified with the school and its interests. (24 Mo. App., 309; 32 Vt., 114; 8 Cush., 160.) Persons over twenty-one when they attend school are subject to all the rules of the school. (27 Me., 266; 45 Ia., 248.) It is held that students are not to be excluded from school for refusing to study what their parents have ordered them not to study. (35 Wis., 359; 87 Ill., 303.) A reasonable rule is to be determined by the court. (63 Ill., 353; 31 Ia., 565.)

PART IV.

INFANCY.

CHAPTER I.

Sec. 373. WHO ARE INFANTS—AGE OF MAJORITY.—All persons are infants, in contemplation of law, until they have reached the age of majority. The age of majority is determined by the municipal law and varies in different countries. Thus by the civil law, which prevails in Spain, Holland, and parts of Germany, full majority is not attained until the person has completed his twenty-fourth year. (Inst. I., 23, 1.) By the common law, from the earliest times, the age of majority is fixed at twenty-one for both sexes. The period is completed at the beginning of the day next preceding the twenty-first anniversary of a person's birth. (1 Bl. Com., 463.) In most States the common law age of majority is followed, but in a number of States, as Ohio, Illinois, Vermont, etc., females become of age at eighteen.

By the age of majority is meant full age, "*perfectae aetatis*," as the civil law expressed it, at which time the person is competent to have complete control of himself and his affairs. Persons under this age are competent for various purposes, as we shall see, but have certain privileges which cease when majority is at-

tained. The status of persons under the age of majority is called infancy.

Sec. 374. GENERAL DISABILITIES OF INFANTS.—An infant is presumed incapable from lack of age of acting with the ability and capacity of an adult. Hence an infant may not hold a legislative or judicial office; or be an executor or trustee, or be a juror or an attorney at law, or in general any office of pecuniary and public responsibility. (Schoul., Dom. Rel., Sec. 394.) But it is held that an infant may be a notary public. (U. S. v. Bixby, 9 Fed. Rep., 78.) Also a deputy sheriff, and an agent. (Browne, Dom. Rel., 106.)

Sec. 375. SAME SUBJECT—AS TO CRIMES.—A child under seven is conclusively incapable of crime, one between seven and fourteen only *prima facie* so, and one over fourteen *prima facie* capable as an adult. (Schoul., Dom. Rel., Sec. 395.) An infant under fourteen is generally held incapable of rape. (Bish., Crim. Law, Secs. 466, 672.) Between the ages of seven and fourteen the responsibility depends upon the capacity to distinguish between right and wrong in respect to the crime with which he is charged. The criminal intent will not be presumed but must be proven. (Williams v. State, 14 Ohio, 222; Willis v. State, 89 Ga., 188.)

Sec. 376. SAME SUBJECT—AS TO TESTIFYING.—The test of an infant's capacity to testify is the ability to appreciate the nature of an oath, and sufficient intelligence to comprehend as a witness. (1

Greenl. Ev., Sec. 366.) The intelligence required is a just appreciation of the facts respecting which testimony is required and ability to relate them truly. (*Johnson v. State*, 61 Ga., 35.) Children have been permitted to testify at the age of seven, and even at five. (*Peterson v. State*, 47 Ga., 524.)

Sec. 377. SAME SUBJECT—AS TO MAKING A WILL.—At common law an infant could not devise realty, but males at fourteen could will personalty, and females at twelve; this was the rule of the civil law. The matter is now regulated by statute, and frequently a distinction is made between real and personal property, twenty-one being fixed as the age for devising realty, and a less age for disposing of personalty. (*Schouler, Wills*, Sec. 43.) In Ohio, Massachusetts, Indiana, Michigan and other States full age is required to dispose of either real or personal property.

Sec. 378. SAME SUBJECT—AS TO CONTRACTS.—A distinction is made between the contracts of an infant as regards their being absolutely void without disaffirmance; or merely voidable, and binding unless disaffirmed at majority. The early rule being, that if for the benefit of the infant the contract is binding; where it is uncertain as to benefit it is voidable; and if prejudicial to the infant it is void. (2 Kent. Com., 236.) But the modern rule is to treat all contracts of an infant as voidable, save those for necessities, which may be binding, and those which would be void as between adults. (*Harner v. Dipple*, 31 Ohio St., 72.) Certain contracts, besides those for nec-

essaries, are held binding upon an infant, as contracts to enlist in the army or navy. (Morrissey, Matter of, 137 U. S., 157; 25 Wis., 390.) The executed contract of marriage after the age of fourteen in males, and twelve in females, is binding. The acts of the corporation will bind infant stockholders, and the contract of apprenticeship made in accordance with the statutes will bind the infant. (Schoul., Dom. Rel., Part V., Ch. 3.)

Sec. 379. SAME SUBJECT—INFANT'S NECESSARIES.—The most important class of binding contracts which an infant may make are those for necessities. But while an infant may bind himself for necessities it is not to be inferred that he is responsible for everything classed as such supplied him, regardless of whether he is in need of them or not. The infant's necessities are judged by the same rules laid down in the case of a married woman, and are practically the same with the addition of education.* The infant is not liable for necessities when he lives with his father who fittingly provides for him. And the tradesman or professional person rendering services to an infant in such circumstances does so at his peril; he must have the consent of the parent or show the necessity of the

*Examples of necessities for an infant are: Counsel fees in his business, dentistry, a horse prescribed for exercise, presents to his bride, etc. Following have been held not to be necessities: A collegiate education, a professional education, betting books, treats while at college, kid gloves, cologne and canes (15 Ark., 137), a bicycle (145 Mass., 588), dinners, suppers, ices, soda water, confectionery, balls and serenades. See Browne's Dom. Rel., 2d ed., 109, 110.

supply or service. (*Perrin v. Wilson*, 10 Mo., 451.) An infant when away from home, and not under the care of his parent or guardian, is usually liable for his necessities. (*Angel v. McLellan*, 16 Mass. 28.)

The term necessities is an elastic one, and will be construed with reference to the estate, social standing, and age of the infant. So, while food, clothing, medical attendance, lodging, and education are the five leading necessities for which an infant may bind himself, yet the extent and character of these vary with the circumstances and general situation of the infant. (*Breed v. Judd*, 1 Gray, 458; *Met. Contr.*, 69.)

The doctrine of necessities does not apply to the contracts of an infant made in the conduct of a business. So, board of horses of an infant hackman is not a necessary. (*Merriam v. Cunningham*, 11 Cush., 40.) Nor are farm implements, live stock, wagons, and the like to be deemed necessities when purchased to carry on a farm. (41 Mo. App., 275.)

Education as a necessary, according to Schouler, rests rather upon respectable dicta than precedents. Lord Coke classed as a necessary "good teaching and instruction whereby he may profit himself afterwards." (*Co. on Litt.*, 172a.) And this has become the general rule, as to the ordinary or common school education. It does not extend to a collegiate education. (*Middlebury College v. Chandler*, 16 Vt., 683.) But a board bill contracted to enable attendance at school is held a necessary. (*Kilgore v. Rich.*, 83 Me., 305. *Schoul., Dom. Rel.*, Sec. 412.)

Where moneys are advanced to an infant to buy necessities he is not held liable in a suit at law. (*Ellis v. Ellis*, 5 Mod., 368.) But in a court of equity he is held liable if he spends it for necessities. (*Smith v. Oliphant*, 2 Sanf., 306; *Price v. Sanders*, 60 Ind., 310.) He is liable at law if the money is advanced to a third person to pay for necessities furnished the infant. (*Swift v. Bennett*, 10 Cush., 436.) Formerly the infant's deed for necessities was binding. But the rule favored now is that the infant's written obligation to pay for necessities is to be inquired into, and he is bound only to pay the amount of their value to him. If the instrument given as security for payment is such that the consideration cannot be inquired into, it is void, otherwise voidable, and the infant is liable for the true value of the articles furnished. (*Reeve, Dom. Rel.*, 229-30; 23 Vt., 378.) So the infant's express contract for necessities is probably only binding to the extent of the reasonable worth of the goods. (*Schoul., Dom. Rel.*, Sec. 414.)

Sec. 380. INFANT'S VOID CONTRACTS.— Certain contracts of an infant are absolutely void. But the rule which held all contracts to his prejudice void has been modified. The rule of *Zouch v. Parsons*, 3 Bur., 1804, is to the effect that all deeds of an infant which do not take effect by delivery of his hand are void, while such as do take effect by delivery of his hand are voidable. But the reason of this rule is questioned. And letters of attorney from an infant conveying no present interest are held void (*idem*). In

this country it is held that an infant's power of attorney to sell land is void, and a sale made under it does not confer even an inchoate title. (*Philpot v. Bingham*, 55 Ala., 435.) But a power of attorney from an infant to sell a note is voidable, and not void. (*Hastings v. Dollarhide*, 24 Cal., 195.) The modern tendency is to treat all contracts of an infant as voidable, unless they are such as would be void if he were an adult. (1 *Pars. Contr.*, 295.) A void contract is a mere nullity, and in legal estimation is incapable of being ratified. Voidable contracts are capable of being subsequently made binding by ratification, or of being avoided by disaffirmance.

Sec. 381. RATIFICATION AND AVOIDANCE OF CONTRACTS.—The disabilities of infancy are personal privileges allowed for his protection against imposition, and no one has the right to avoid the infant's contracts, save himself, his heirs, and legal representatives. So the persons contracting with him are bound, though he is not. No one but the infant can object to the contract. The vendor cannot avoid the infant's purchase; a corporation cannot reject an infant's transfer of stock; nor a stranger impeach the conveyance of an infant. In fine, the defense of infancy is for the benefit and protection of the infant; and other persons may not set it up for their own benefit, at all events if the contract be not void. (*Schoul., Dom. Rel.*, Sec. 402.)*

* "But third persons should be allowed to protect themselves against incurring undue liabilities on an infant's behalf.

When the contract is voidable, the infant has his election either to avoid it during his minority, or within a reasonable time after reaching his majority; otherwise, it may be taken to be confirmed, as after majority he is capable and must make his election. (*Rice v. Bowers*, 108 Ind., 472; 100 Mo., 584.) By statute in Iowa and Kansas, the infant is required to avoid the contract within a reasonable time or it will be considered as affirmed. (*Dillon v. Burnham*, 43 Kans., 77; 89 Ia., 76.)

The general rule is that the infant need not place the other party in statu quo when he disaffirms his contracts. (99 Mass., 508.) Where he has bought or sold personal property, and receives pay, if he has the consideration he must return it when he disaffirms. But if he has spent, wasted, lost or squandered the consideration he is not obliged to return it, and can repudiate without making tender. (*Craig v. Van Beber*, 100 Mo., 584; *Raynolds v. McCurry*, 100 Ill., 356.) But he may not retain either real or personal property without paying the purchase price. (*Kerr v. Bell*, 44 Mo., 120.) Money voluntarily paid by an infant under

Thus, an officer selling property at public auction is not bound to accept the bid of an infant. And although infancy is a personal privilege, yet the administrator of the estate of an infant may avail himself of the infancy of his intestate, to avoid or uphold a transaction to which the latter was a party during his life, and which remained voidable at his death. (*Turpin vs. Turpin*, 16 Ohio St., 270.) And as a rule the right of avoidance, with due limitations of time and circumstances, passes to privies in blood entitled to the estate; in short, to his heirs or legal representatives." (*Schoul. Dom. Rel.*, 5th ed., pp. 402, 403.)

a contract from which he has derived no benefit may be recovered back upon disaffirmance without allowing for the expense or trouble of the other party. (*Shurtleff v. Millard*, 12 R. I., 272; *Contra, Ins. Co. v. Atty. General*, 127 Ill., 257.) Or, if the infant contract to perform labor, he may disaffirm on coming of age, and recover quantum meruit, and without allowance to the other party for damages. (*Gaffney v. Hayden*, 110 Mass., 137; *Morse v. Ely*, 159 Mass., 458.) Where the contract was reasonable, executed, and the party did not know of the infancy, the infant could not disaffirm. (*Spicer v. Earl*, 41 Mich., 191.)

Sec. 382. SAME SUBJECT—RATIFICATION.—Ratification is the affirmance of a voidable contract after the minor has become of full age. Just what constitutes a ratification is not always clear. Some courts hold that there must be an express promise to do or perform the contract. (*Proctor v. Sears*, 4 Allen, 95.) Other States hold that any act or language expressing an intent to be bound will be sufficient. (*Lantz v. Fowler*, 61 Mich., 471; *Henry v. Root*, 33 N. Y., 526; *Baker v. Press*, 54 Mo., 82.) Or some act equivalent to a new contract. (*Tyler v. Gallop*, 68 Mich., 185.) The new promise does not require a new consideration, but it must be unconditional, or, if on condition, it must appear that the condition has been performed. (*Proctor v. Sears*, 4 Allen, 95.) A mere acknowledgment of the contract is not ratification. (*Dunlop v. Hales*, 2 Jones, N. C., 382.) Nor is a mere part payment of the contract price. (*Robbins v. Eaton*, 10

N. H., 561; *Contra*, *Henry v. Root*, *Supra*.) Lord Tenterden's Act (9 Geo. IV., c. 14, Sec. 5) ends this question in England, by providing that the ratification must be made in writing and signed by the party. And some States have similar provisions. (*Thurlow v. Gillmore*, 40 Me., 378.)

Sec. 383. SAME SUBJECT—INSTANCES.—In the absence of statute what constitutes a ratification is a matter of precedent. Mere silence for any length of time after obtaining his majority short of a period sufficient to constitute a defense under the statute of limitations is not a ratification. (*Sims v. Everhard*, 102 U. S., 300.) But silence, with knowledge of acts on the part of other parties which create a duty for the former infant to speak, will create an estoppel amounting to a ratification. And so will positive acts of encouragement on his part, or acts which help to mislead another who has relied upon the contract. (136 Pa. St., 588.)

Where the infant sells and delivers personalty and receives the pay, mere acquiescence does not confirm the contract. But if the contract is executory, and he receives payment after majority, as if a note were given and he collects it, this will ratify the contract. (*Boody v. McKenny*, 23 Me., 517.) So, where he has purchased personal property and continues to use it after majority, he is held to have ratified the contract. (*idem*.)

An infant may disaffirm his conveyance of real estate, though he has been silent for years, and recog-

nized the fact that he had given a deed, and unless the statute of limitation bars him he may disaffirm. (*Tucker v. Moreland*, 10 Pet., 58; *Drake v. Ramsey*, 5 Ohio, 251.) An act of disaffirmation is required, as by conveyance to some one else; while any new conveyance by way of affirmance makes the infant's deed valid. (*Mette v. Feltgen*, 148 Ill., 357.) To affirm or avoid in this case he must be of full age. (*Pool v. Mix*, 17 Wend., 118.) Statutes may provide a reasonable time, as three years, within which he must elect to avoid or affirm. (*Irvine v. Irvine*, 9 Wall., 617.) If the infant is grantee in a deed, or is lessee or lessor, and continues to occupy the property or receive the rent, he is held to have ratified the contract. (*Baker v. Press*, 54 Mo., 82.)

The Supreme Court in *Irvine v. Irvine*, *supra*, holds that it is a question for the jury and not for the court to decide, whether the evidence submitted in any case shows an affirmance or not, if there be any evidence tending to show it. So, whether or not the infant has chosen to disaffirm within a reasonable time after coming of age, is to be determined by the facts and circumstances in each case. (*Schoul., Dom. Rel., Sec. 437.*)*

*Ratification; Summary of Doctrine. Schouler says: "This writer makes no attempt to reconcile the numerous dicta of the courts upon this important subject. They are irreconcilable. If American decisions themselves may be regarded as pointing out a general rule; it seems to be this—that the mere acknowledgment that a certain transaction constitutes a debt is insufficient to bind him lately an infant; but that an acknowledgment to the extent that he justly owes that debt, with equivocal expressions as to some future payment, may or may not be considered sufficient, though the better opinion is in favor of their sufficiency; that acts or omissions on his

Sec. 384. INFANT'S LIABILITY FOR HIS TORTS.—It is a general principle that infancy shall not be permitted to protect wrongful acts. (2 Kent. Com., 240.) For every injury to the person or property of another arising ex delicto infants must respond in damages to the extent of their pecuniary means. (Bullock v. Babcock, 3 Wend., 391.) And for a tort committed with force he is liable at any age. (Neal v. Gillett, 23 Conn., 437.) Thus, an infant is responsible for an assault and battery; for over-driving a horse; for a nuisance; for conversion of a bailed article; for trover; for detinue; money stolen; and for goods obtained on credit intending not to pay. See Browne, Dom. Rel., pp. 118-119.

But an infant is not liable for torts founded on contracts. (Jennings v. Rundall, 8 T. R., 335.) In this case an infant was not liable for killing a horse while using it for hire. But in Towne v. Wiley, 23 Vt., 355, where he had converted the horse to his own use by using it other than he had contracted for, he was held liable. The principle being that an infant is liable for his torts, but not for mere violations of a contract,

part, which are prejudicial to the adult party's interests, or evince his own intention to retain the consideration and advantages of a contract made during infancy, may be, especially when reasonable time has elapsed, construed into a ratification, without an express promise, the presumption of honorable motives being fair and reasonable under such circumstances; and finally, that a distinct, unequivocal promise, verbal or written, made after attaining majority, is always sufficient, this apparently superseding the former promise altogether." (Dom. Rel., Sec. 437.)

though attended with tortious results. If the tort is separable from the contract the infant is liable. (*Fitts v. Hall*, 9 N. H., 441; *Schoul.*, Dom. Rel., Sec. 424.)

Sec. 385. SAME SUBJECT — INFANT'S FRAUDULENT REPRESENTATIONS AS TO AGE.—There is a conflict as to the liability of an infant for false representations as to his age. Many cases hold that an infant who falsely affirms goods to be his own, and that he had a right to sell them, and thereby induces the plaintiff to purchase them is not responsible. And still more frequently has it been held that for a false and fraudulent representation that he was of full age, there is no remedy against the infant; whether or not money were advanced or goods intrusted to him on the strength of such representations. (*Schouler*, D. Rel., Sec. 425; *Wieland v. Kobick*, 110 Ill., 16.) But in Texas an infant was held responsible for fraudulent representations. (*Kilgore v. Jordan*, 17 Tex., 341.) And in a Kentucky case the court refused to allow a deed made by a wife and her husband to be avoided on the ground of the wife's infancy, when, to induce the innocent purchaser to take the land, she and her husband had made oath before a magistrate that to the best of their knowledge and information she was more than twenty-one years old. (*Schmeitheimer v. Eiseman*, 7 Bush, 298.) Several States, as Iowa and Kansas, have by statute regulated this matter, and prevent an infant grantee who has represented himself of age to afterwards disaffirm his contract on the ground of infancy. (*Prouty v. Edgar*, 6 Ia., 353; *Dillon v. Burnham*, 43 Kans., 77.)

Sec. 386. TORTS SUFFERED BY INFANTS.—As to injuries and frauds suffered by infants, the ordinary principles apply as in the case of adults, with some enlargements because of their inexperience. Thus, a child, eight years old, was held to have an action against one who sold him gunpowder at his own request, and by which he was injured. (*Spencer v. Carr.*, 45 N. Y., 406.)

The doctrine of contributory negligence which bars a suit by an adult for an injury, which his own negligence contributed to bring about, applies to the suits by infants, but with this difference, that the child need only exercise that care of which he is presumed capable at his age. Due average care, according to age, sex, and capacity, is all that the law exacts of any child of tender years. (*Schoul., Dom. Rel.*, Sec. 428.) A few cases hold that the child may be barred from an action where he is trespassing or meddling with property not his own. (140 Pa. St., 475.) Others hold that though the child is a trespasser, and the defendant has left some attractive but dangerous machinery unguarded, the child may recover. (*Penso v. McCormick*, 125 Ind., 116; 120 N. Y., 526.)

A child may be so young as to be incapable of exercising due care, or any care. When the age of the child admits no doubt of its incapacity to avoid danger the court will decide the question as a matter of law. (21 Wend., 617.) In no case where the child is over seven is it held incapable of exercising care. (27 Ind., 513; 84 Ill., 483.) When the age of the child is such that its capacity is a matter of doubt, it is a question

for the jury to say whether it is or is not *sui juris*. (Thomp. Neg., Sec. 1182; 115 N. Y., 104.)

Where children are employed to operate machinery it is the duty of the employer to point out the danger of the work, and explain the operation of the machine so as to enable the child to comprehend the danger. Defects must be known to the employer to render him liable, and the child must exercise due care in avoiding danger. (*McCarragher v. Rodgers*, 120 N. Y., 526.) If the child appreciates the danger of the occupation as well as an adult, he is expected to exercise the same care as an adult would. (113 N. Y., 540.)

Sec. 387. SAME SUBJECT—THE NEGLIGENCE OF PARENTS.—Some cases charge or impute the negligence of parents or those having charge of infants to the infants themselves; as where a quite young child is negligently permitted to run in the highway, and is there injured. (*Hartfeld v. Roper*, 21 Wend., 617.) The rule of the New York, Massachusetts, Illinois and some other courts is that a child too young to have discretion for himself cannot recover if his protector fails to exercise ordinary care, but he may if he uses such care as is usual with children of the same age, and the protector also exercises ordinary care. (Schoul., Dom. Rel., Sec. 429.) In various other States the child's exercise of ordinary care is all that is regarded. (*Robinson v. Cone*, 22 Vt., 213; *Bellefontaine Railroad Co. v. Snyder*, 18 Ohio St., 399.)

Where the child sues by guardian or next friend, the

negligence of the custodian should not prevent the child from recovering. (78 Ia., 396; *Newman v. Phillipsburg R.*, 52 N. J. L., 446.) But where the parent sues, and it was his negligent exposing of the child that contributed to the injury, the parent cannot recover. (*Schwenck v. Kehler*, 122 Pa. St., 67; 78 Ia., 396.)

Sec. 388. INFANT'S SUITS.—An infant can sue and defend civil suits at law by guardian or next friend only, and not by attorney or in person. (Co. Litt., 88b; *Starbird v. Moore*, 21 Vt., 529.) A guardian ad litem may be appointed to defend an action against him. The statute of limitation does not run against the infant during minority, and statutes extend the immunity for a period after majority. The infant is bound by the decree or judgment fairly rendered as an adult. Having appeared by guardian ad litem, and having been served with process he can only dispute the judgment for fraud, collusion, or fundamental error. (*Stupp v. Holmes*, 48 Mo., 89; *Driver v. Driver*, 6 Ind., 286.)

PART V.

MASTER AND SERVANT.

CHAPTER I.

Sec. 389. MASTER AND SERVANT AS A DOMESTIC RELATION.—The legal branch commonly known as master and servant is not strictly a domestic relation, as it is enlarged to include all sorts of contracts wherein one person engages to labor for another, that is, the relation of employer and employed. Blackstone treats master and servant as one of the private or domestic relations, saying that it is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labor will not be sufficient to answer the cares incumbent upon him. (1 Bl. Com., 422.) But at the common law, in the time of Blackstone, and previous, there was reason to class the relation between the worker and the employer as that of master and servant. Of the several classes of servants, two at least were directly concerned with the household or family of the employer. Menial or domestic servants and apprentices were practically a part of the family, and their regulation, control, privileges and duties might well be classed within the bounds of the domestic relations. But the respective conditions of the master and ser-

vant have changed, none of the incidents which at common law made it a domestic relation, or warranted the designation of the parties as "master" and "servant" now apply, and the obsolete expression continues as a mere matter of precedent and sufferance.

Sec. 390. CRITICISM OF THE RELATION.—

"A master is one who has legal authority over another; and the person over whom such authority may be rightfully exercised is his servant. The relation of master and servant presupposes two parties who stand on an unequal footing in their mutual dealings; yet not naturally so, as in other domestic relations, nor necessarily because the subordinate is wanting in either years or discretion. This relation is, in theory, hostile to the genius of free institutions. It bears the marks of social caste. Hence it may be pronounced as a relation of more general importance in ancient than modern times, and better applicable at this day to English than American society." (Schoul., Dom. Rel., Sec. 454.) "The title of 'master and servant,' at the head of a lecture, does not sound very harmoniously to republican ears. And, in fact, servitude, strictly so-called, does not exist in this country. . . . In fact, we understand by the relation of master and servant, nothing more or less than employer and employed." (Walker, Am. Law, Sec. 114.)*

*Blackstone, about to treat of the several sorts of servants, says: "Pure and proper slavery does not, nay cannot, subsist in England; such, I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And indeed it is repugnant to reason, and the principles

Sec. 391. CLASSES OF SERVANTS AT COMMON LAW.—By the common law servants were either: 1, Menial servants or domestics; 2, apprentices; 3, laborers; 4, ministerial servants, as stewards, factors and bailiffs.

of natural law, that such a state should subsist anywhere." (1. Bl. Com., 423.)

The same learned commentator then proceeds with direct and keen logic to demolish the three origins of the right of slavery, assigned by Justinian, the great father of the civil law. This reasoning is so unique as to deserve notice. 1. Slavery, according to the civilians, is held to arise from a state of captivity in war, as the conqueror had a right to the life of his captive, and having spared that, has a right to deal with him as he pleases. Blackstone replies: "A man has only a right to kill his enemy in particular cases, in cases of absolute necessity, for self-defense; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. War is itself justifiable only on principles of self-preservation; and therefore it gives no other right over prisoners than merely to disable them from doing harm to us, by confining their persons; much less can it give a right to kill, torture, abuse, plunder, or even enslave an enemy, when the war is over."

2. The civilians urged that slavery may begin when one man sells himself to another. But Blackstone rejoins: "Every sale implies a price, a *quid pro quo*, an equivalent given to the seller in lieu of what he transfers to the buyer; but what equivalent can be given for life and liberty, both of which, in absolute slavery, are held to be in the master's disposal? His property also, the very price he seems to receive, devolves *ipso facto* to his master the instant he becomes his slave. In this case the buyer gives nothing, and the seller receives nothing. Of what validity, then, can a sale be which destroys the very principles upon which all sales are founded?"

3. Lastly, the civilians claim that slaves are born—that is, slavery is hereditary, the children of acquired slaves are, *jura naturae*, by a negative kind of birthright, slaves also. "But

1. Menial Servants.—These were such as lived “intra maenia” as part of the family. The contract here was one of hiring, but if no time was stated the law construed it to be for a year. So by law all single men

this,” says Blackstone, “being built on the two former rights, must fall together with them. (I. Bl. Com., 423, 424.)

It is interesting to note that only 1,250 years were required to revolutionize the settled principles of law in regard to slavery; true, it continued for some years after Blackstone wrote, but its death knell had been rung. In less than 150 years a great change has been made in the law regulating master and servant. And incidents of domestic or menial slavery, which were approved and enforced in Blackstone’s time, are now entirely repudiated.

Seeing this advancement, we may well question how long civilization will tolerate the relation of employer and employed as now conducted and sanctioned.

As Professor Schouler truly says, the relation of master and servant, or employer and employed, is hostile to the genius of free institutions. It bears the mark of social caste. Of the forty-eight classes forming the English society of Blackstone’s time the “labourers” were the last and lowest; of the seventy-five classes that now compose that queen-loving race, the “laborers” are still the last and lowest. (Cooley’s Bl. Com., 406n.) In America, our fundamental law forbids, and with reason, the actual taking on of caste designations, but in our Eastern cities, the plutocratic classes, who have taken to themselves the earnings of the laborers, are imitating and in some cases outdoing the riotous excesses of feudal lords and law-made aristocrats.

We have, as they had in the past, a parasitic class, whose interest it is to say “that the relation of master and servant must exist,” and “that difference of condition makes some persons employers and others laborers.” The same statement will, and did, justify the existence of slaves and freemen.

The right to work does not necessarily include the duty of being “worked.” Among the intelligent Americans who are demanding the right to work are those who also insist that the right shall not be made dependent upon paying an idle

between twelve and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having a visible livelihood, were compelled to go out to service. No master could put

capitalistic class a large per cent. of the workers' earnings. This question, in a crude form, came before the entire American people in the Presidential election of 1896, and will constantly recur until properly solved. The absolute elimination of social caste, trusts, monopolies and plutocrats will come when the worker gets his due; when the right to work shall be free; when men shall work for themselves, and not for Rockefeller, Havemeyer, or any trust whose earnings go to swell the coffers of certain individuals.

It may be asked, How are men to work for themselves? Indeed, so habitual has become the highly unnatural system by which men work to swell the private fortunes of the few that some persons cannot conceive of a different order of affairs. The same was true at an early day of political affairs. A country could not possibly have existed without an arbitrary and absolute despot, whom men called a king! The people of America have ousted the king and distribute his power among themselves. We prophesy that the time will come when they will do as much for the industrial despots, and common or public ownership will be equally prized with common or public government.

It is natural for men to work for themselves; it is patriotic for them to work for their common government and general welfare. But it is unnatural, unjust and tyrannical to make men support in idleness and luxury those able to work for themselves, and it is nothing short of slavery, when by law, or conditions, one man must give the profits of his earnings to another for the privilege of working.

Nature does not classify men as masters and servants, employers and employed, nor specify that some shall have the privilege of setting the others to work, and take the bulk of their productions as a recompense for so doing! Man works to supply his wants, and the needs of those dependent upon him. The division of men into masters and servants arises in the same way, and is justified by the arguments that support

away such a servant, or servant leave the master, without a quarter's warning, except by consent or for reasonable cause. ((1 Bl. Com., 425.)

2. Apprentices—Were persons bound out for a number of years by indentures to serve the master, and in return to be maintained and instructed by him, in some trade or calling. Children of poor persons were apprenticed by the overseers to capable persons, who were compelled to take them. (1 Bl. Com., 426.)

3. Laborers.—These were only hired by the day or week, and were not a part of the family. The law required all without property to work; defined the length of time they should work in summer and winter; pun-

slavery. Captivity, sale, heredity; these are the three ways in which one man becomes the workman or servant for another. Let us examine these: Captivity is now obsolete, and, except in the most primitive civilizations, is not a justifiable method of securing a servant. 2. Sale, this is the universal method, at present, of securing assistance of others. The worker sells his service to the employer, this according to Blackstone, who takes Justinian to task, is very just. But let us see. "Every sale implies a price, a quid pro quo, an equivalent given to the seller in lieu of what he transfers to the buyer." But what equivalent can be given for life and liberty, both of which the wage-slave surrenders to his trust employer? The wages—or price which he seems to receive—comes not from the employer, but is only a portion of the result of his own labor. "In this case, therefore, the buyer gives nothing, and the seller receives nothing," save that which is his own. Of what foundation, then, is the claim of the employer to the surplus earnings of the employed? 3. Heredity is another means by which the ranks of the servant class are kept filled. The children of the "man with the hoe," the robbed workers of to-day, "by a negative kind of birthright," are slaves or servants also. But this, being built on the two former wrongs, will fall together with them!

ished them for leaving their work; empowered the justices to fix their wages; and inflicted penalties for giving or exacting more wages than were so fixed.*

4. The fourth class of servants were of a higher and more respected class than the former. They were regarded as servants *pro tempore*, as their acts affected the master's property. (1 Bl. Com., 427.)

Sec. 392. EFFECT OF THE RELATION AT COMMON LAW.—By service, all servants and laborers, except apprentices, became entitled to wages; according to their agreement, if menial servants; or according to the fixed wage if laborers or servants in husbandry. The master had the right to correct his apprentice for negligence or other misbehavior, if done with moderation. But the beating of any other servant of full age was a good cause of leaving. If the servant or laborer assaulted the master he might be imprisoned a year with other corporal punishment. Apprentices serving seven years to a trade were given the exclusive right to exercise that trade in any part of England.**

*Harsh as we may think these provisions of the common law upon the laborer, they do not equal the severity of our vagrant laws, by which men are regarded as criminals for no other reason than that they are out of work and are looking for it. Convicted of being vagrants, they are made to work in a penal institution for their board, instead of being given honorable employment by the state at a living wage.

**1. Bl. Com., 427, 428. The exclusive right to follow a trade given to seven-year apprentices was a matter of statute, as the early common law allowed every man to use what trade he pleased. The well-to-do artisans chose this method of pro-

Sec. 393. SAME SUBJECT CONTINUED.—

At common law the master could assist his servant in an action at law against a stranger, and not be guilty of maintenance. The master could also bring an action against one who beat or maimed his servant, but in this case his damage was the loss of service which should be specially pleaded and proved. The master could justify an assault in defense of his servant, and the servant in defense of the master. So an action lay by the master against one who knowingly hired his servant, and for the debauching of a female servant. The master was responsible for the acts of his servant upon his express or implied command, on the principle "*qui facit per alium, facit per se.*" Therefore, if a servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it; though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. So, if the drawer at a tavern sells bad wine, whereby a person's health is injured, an action lies against the master, as the master in permitting the

tecting themselves against competition. It was a monopoly of the mechanical trades by fixing an unreasonable apprenticeship. Years and not skill was the requirement; further, only a certain number of apprentices were to be instructed at all. This sort of a monopoly seems to be again gaining favor in some states in the professions. Fitness and ability the state should require from every person who offers to do professional or skilled labor, and this should be evidenced by an examination. But a requirement of years of study in designated institutions, or of so unreasonable and expensive a character as to debar all but the most favored, seeks to establish a monopoly of the most vicious sort.

servant to draw and sell it at all is impliedly giving him a general command. In the same manner whatever the servant is generally permitted to do in the general course of the master's business is equivalent to a general command. Hence, if the master deals with a tradesman by himself, and not through the servant, he is not responsible for what the servant gets upon his account, as there is no implied order; but where the master usually sends the servant to a tradesman, sometimes with money and sometimes to get credit, then he is responsible for all that the servant gets. (1 Bl. Com., 430.) Though the master lose by a dishonest servant's behavior in the performance of a trust, yet he is responsible, as the wrong of the servant is considered that of the master himself. (*idem.*)

Sec. 394. THE RELATION IN MODERN LAW.—As we have seen the relation of master and servant to-day is simply that of employer and employed, or principal and agent. It arises from a contract, express or implied, and with a few exceptions might be treated as any other contract. The common law classes of servants have lost their significance, with the exception of apprentices, with respect to whom our law is chiefly statutory. (Walker, Am. Law, Sec. 114.) We shall treat the subject briefly as is ordinarily done, when considered as one of the domestic relations.*

*The subject of Principal and Agent will be treated at length in a subsequent number of the Home Law School Series, and therefore will not be broached here.

Sec. 395. FORMATION OF THE RELATION.

—As the relation is founded on contract, one who volunteers to work for another does not become entitled to pay. (*Bartholomew v. Jackson*, 20 Johns., 28.) The assent of both parties is essential to the contract of hiring, but a man who has an opportunity to accept or reject work, and does not reject it, may be presumed to have assented. (28 Ia., 545.) This presumption does not arise where the parties are related, and there is no intention of paying for the service. (42 Mich., 51.) But an orphan minor, brought up in the family, not as a member, but rather in a menial capacity, was held entitled to reasonable payment for services, less board, clothing, and other necessities furnished him. (*Lockwood v. Robbins*, 125 Ind., 398.)

There is no clear test of the existence of the relation in the kind of employment or in the manner of employment, nor in the power of discharging the person. If there is a test it is whether the servant is bound to obey, and subject to the supervision of the master. Where one is neither employed, paid, nor controlled by another, he is not his servant in the legal sense. (71 Mo., 303; *Schoul., Dom. Rel., Sec. 461.*) Where the owner of a building employs a plumber to repair pipes, or a roofer to repair a roof, in his own way, retaining himself no direction, he is not master in the sense of liability to third persons for this party's negligence. (*Bennett v. Truebody*, 66 Cal., 509; *Hexamer v. Webb*, 101 N. Y., 377.) See *Cincinnati v. Stone*, 5 Ohio St., 38.)

Sec. 396. THE CONTRACT OF HIRING; WHEN TO BE IN WRITING.—The relation is created when the servant is employed, not by the master directly, but by some employe in charge of a part of the business, with authority to engage assistants. (*Rummell v. Dilworth*, 111 Pa. St., 343.)

By the statute of frauds, a contract of hiring, which is not to be performed within a year from the time of making it, should be in writing. Hence a verbal agreement to hire for a year, commencing on a future day is void. (*Sutcliffe v. Atlantic Mills*, 13 R. I., 480.) But where under a contract for a year's service, the employed party has gone on from year to year, without objection, the presumption arises that both parties have assented to the contract for another year, and it need not be in writing. (*Tatterson v. Suffolk Mfg. Co.*, 106 Mass., 56.)

By the common law a general hiring without limitation was regarded as a hiring for a year. But in the United States there is no inflexible rule as to the duration of the service in the absence of express terms. Custom, the nature of the work, and the intervals of payment may be regarded to determine the respective rights of the parties. (*Lord v. Goldberg*, 81 Cal., 596; 83 Ga., 773; *Lyon v. George*, 44 Md., 295.) And the same principles apply where the contract has expired and the parties continue without a new contract. (106 Mass., 56; 52 Hun, 421.)

Sec. 397. TERMINATION OF THE RELATION.—The relation is terminable in various ways:

1, At the expiration of the term of service, or by the death of either party; 2, it may be terminated before the expiration of the contract, by mutual agreement, whether provided in the contract or not; by the discharge of the servant by the master for justifiable cause, as for unreasonable disobedience, moral misconduct, and negligence; by the servant for justifiable causes, as serious illness, failure of master to pay as agreed, etc.; or by the servant without justifiable cause.

The contract of service being personal is dissolved by the death of either party. When the mutual agreement to terminate is anticipated in the contract, it is competent for either party to contract that the other shall have the right to terminate the contract abruptly, while he agrees to do so only on notice. (*Preston v. Am. Linen Co.*, 119 Mass., 400.) See *Stockley v. Goodwin*, 78 Ill., 127.

The disobedience of the servant which would authorize a dismissal by the master, as held by the older cases, was seemingly any disobedience, whether unreasonable or not. As where a servant was ordered to go with the horses on an errand a mile off, just as dinner was ready, and he refused to go without dinner; and where a housemaid persisted in going to see her sick mother, though ordered not to go by her master; these were held as justifying a dismissal. (*Schoul., Dom. Rel.*, Sec. 462.) But we are safe in saying that no court would go this length at the present day. In *Shaver v. Ingham*, 58 Mich., 649, the absence for a single day of a servant, which caused the master no serious consequences, was held not to justify a dis-

missal. Hence the word disobedience should be qualified to the expression, unreasonable disobedience.

Moral misconduct of the servant includes pregnancy of a maid-servant; drunkenness (31 Mo., 585); insolence (56 Hun, 1); engaging in the same business on his own account during the term of service (*Dieringer v. Meyer*, 42 Wis., 311). See *Browne, Dom. Rel.*, 126.

For wanton negligence, or palpable inefficiency the servant may be discharged, but the master may condone an act of negligence and lose the right to discharge the servant. (1 N. Y. Supr., 361.)

The servant is justified in leaving the employment before the expiration of the term of service for the following reasons: Serious illness (21 Wis., 396); failure of the master to pay wages as agreed (6 Wall., 561); for being compelled to work on Sunday (81 Me., 356); requiring service from him not contemplated in the contract (7 La. Ann., 229); exposing the servant to danger from negligent fellow-servants, or defective machinery (84 Mich., 289; *Wood, M. & S.*, 146).

Sec. 398. RIGHTS UNDER THE CONTRACT.
—The consideration in the contract of hiring is the service rendered on the one side and the wages to be paid on the other.

When the contract is ended, as provided by its terms, or by mutual agreement, the servant is entitled to the wages due up to the end of the service.

When the servant is discharged for lawful cause by the master, the rule was formerly that he could not recover his wages, but he can now recover the value of

his services up to the discharge, less damages suffered by the master because of his tortious acts, and perhaps less the loss occasioned by his leaving. (Wood, Master & Serv., 127-8.)

When the servant is wrongfully discharged by the master the common law gives two remedies; one, to treat the contract as a continuous one, and sue in damages for the breach thereof; the other to consider it as rescinded, and sue his master on a quantum meruit for the services he has actually rendered. (*Colburn v. Woodworth*, 31 Barb., 381.) Formerly it was held he had a third remedy, namely, to wait till the termination of the period of service, and then sue for his whole wages in assumpsit, relying on the doctrine of constructive service; but according to the best authorities this cannot now be adopted. (*Schoul., Dom. Rel., Sec. 472*; *James v. Allen Co.*, 44 Ohio St., 226.) The servant can recover wages for the whole term, less what he had an opportunity to make by like service after his dismissal, and it is damages rather than strict wages that he recovers. When the servant sues for what the services were worth, and treats the contract as rescinded, he can only recover wages for the period during which he served. (*Weed v. Burt*, 78 N. Y., 191.)

Sec. 399. THE MASTER'S DUTY TO HIS SERVANTS.—It is the master's duty:

1. To exercise due care in providing and repairing suitable machinery and appliances for carrying on the business for which he employs the servant. (*Hough v. Railroad Co.*, 100 U. S., 213.)

2. To exercise due care in providing a sufficient number of suitable fellow-servants. (*Nichols v. Brush Co.*, 53 Hun, 137; 75 N. Y., 38.)

3. To point out to servants the dangers of the employment not obvious, yet known to the master. (*Melchert v. Smith Brew. Co.*, 140 Pa. St., 448; 84 Mich., 676.)

4. After notice, he is bound to repair defective machinery, and dismiss incompetent servants. (*Laning v. N. Y. C. Ry. Co.*, 49 N. Y., 521; 84 Mich., 289.)

5. To explain to inexperienced or youthful servants the nature of the work or machine they are to be employed on, disclosing the dangers of the employment, and giving instructions how to perform their work and keep clear of danger. (*Rummell v. Dilworth*, 131 Pa. St., 509; 51 N. J. L., 507.)

6. The master's duties extend to, and he is liable for, breaches of the above duties by those to whom he has delegated their performance. (100 U. S., 217; 105 N. Y., 159; 53 Hun, 137.) This is called the doctrine of vice-principal. And whether or not a servant is a vice-principal depends upon the character of the act in the performance of which the injury arises, without regard to the rank of the employe performing it. (112 N. Y., 614; 41 Minn., 212.)

7. As a general rule, the servant assumes all risks arising from his employment, or from the acts or omissions of his fellow-servants that he knew, or by the exercise of prudence might have known, were naturally and probably incident thereto. (*Central Ry. Co. v.*

Peacock, 69 Md., 257.) Fellow-servants are those in the employ of the same master, engaged in the same common work, and performing duties for the same general purpose. (*Laning v. Ry. Co.*, 49 N. Y., 521.)

For a breach of any of the above specified duties the master is liable in damages to the servant, and he may not contract beforehand with the servant for release from liability for his own or his other employe's neglect. (*Lake Shore Ry. Co. v. Spangler*, 44 Ohio St., 571; 29 Kans., 122.)

Sec. 400. SERVANT'S RIGHTS AND LIABILITIES AS REGARDS THE MASTER.—The servant assumes the risks ordinarily incident to his employment, after the master has performed his duty as stated in the previous section. And if he learns of defects in the machinery or appliances, or of the incompetency of his fellow-servants, and makes no complaint, he also assumes the risks incident to such defects and incompetencies. (*Davis v. Ry. Co.*, 20 Mich., 105.) If he notifies the master of the defects or incompetencies, and is given to understand that the matter will be remedied, he may wait a reasonable time for this to be done and not lose his rights (*Eureka Co. v. Bass*, 81 Ala., 200; 84 Mich., 289.)

The servant is liable to the master for gross negligence in the care of his property, but not for ordinary accidents. And he is liable to his master for the consequences of his negligence or misconduct. (*Smith v. Foran*, 43 Conn., 244.)

Sec. 401. MASTER'S LIABILITY TO OTHERS FOR THE SERVANT'S TORTS.—The common

law rule of the master being responsible for the acts of his servant within the scope of his authority and employment still maintains. And it is held, though the particular acts were not authorized, or were even forbidden, yet he is liable. (*Singer Mfg. Co. v. Rohn*, 132 U. S., 518; *Smith, Mast. & Serv.*, 151-2.) What acts of negligence, wrong-doing and the like of the servant come within the scope of the employment is a question to be decided in each case. The following have been held to fall within the rule and bind the master: Negligent driving by a servant; negligent kindling of a fire, also applied to fires kindled by locomotive engineers; piling up wood improperly; mismanagement of a boat; causing injury; negligent management of gas by the servant of a gas company; negligence in leaving a cellar hole open (76 Me., 100); infringement of a patent by workmen; unskillful workmanship; throwing things out of a window upon a passerby, etc., cases cited by Schouler (*Dom. Rel.*, Sec. 490n.)

But the master is not responsible for the wilful and unlawful acts of his servants toward strangers, if the acts are outside of his employment, and which the master did not intend, nor could be supposed from the nature of the employment to have authorized or expected the servant to do. (*Cooley*, *Torts*. p. 525; *Railroad Co. v. State*, 69 Md., 557; *Smith, Mast. & Serv.*, 160.) Thus, though the servant is driving the master's team, but in the servant's own private business and not that of the master, the servant alone is responsible. (*Way v. Powers*, 57 Vt., 135.) Or, where one performs a task outside of his ordinary and proper employment,

or turns aside from an undertaking in which he was employed to perform a different one, and injury results, the master is not responsible. (Cavanaugh v. Dinsmore, 19 N. Y. Supr., 465; Stone v. Hills, 45 Conn., 44.)

Again, it is the rule that a servant could have no implied authority to do that which is unlawful for either him or his master to do. (L. R. 2 Q. B., 534.) Nor is the master liable if the person injured was not in the exercise of ordinary care at the time of the injury, and hence contributed to it. (Illinois Ry. Co. v. Baches, 55 Ill., 379; Schoul., Dom. Rel., Sec. 491.)

QUESTIONS FOR STUDENTS.

The questions are numbered to correspond with the sections in this book. The answers and references for further study may be obtained by referring to the corresponding sections.

PERSONAL RIGHTS.

236. What is meant by a right? Define a legal right.
237. How is a legal right given validity and force? Distinguish between substantive and adjective law.
238. Explain how duties arise.
239. From what author's classification do we get the topic of personal rights? Give Blackstone's fourfold division of the law.
240. What criticism does Judge Cooley make of Blackstone's division of rights?
241. What did Blackstone include under the head of "Rights of Persons?" What is the usual scope of the subject of personal rights?
242. Define and explain the classes of persons at law.
243. Define and distinguish absolute and relative rights. What is meant by an absolute duty? Does the law enforce absolute duties? Explain your answer.
244. What may be said of the importance of protecting absolute rights? Are absolute rights numerous?
245. What general term is given to the sum of absolute rights? Define natural liberty; civil liberty.
246. How is civil liberty established? Explain fully.
247. Discuss what government is best suited to secure civil liberty. What is the lesson of history in this regard?
248. To what do absolute rights owe their establishment and recognition? What does Blackstone say of their establishment in English law? What may be said of their establishment in America?
249. Give the three primary articles of absolute rights. What does the preservation of these include?

250. Repeat the general divisions of absolute rights.
251. In what does personal security consist?
252. What may be said as to the protection of the individual's life? By what penalty is a violation of this right punished?
253. How did the common law regard a person's members that were useful in fight? What is meant by mayhem?
254. Explain what is meant by self-defense; by duress. What two sorts of duress are mentioned by Blackstone? Explain each.
255. What may be said of the right of the poor and indigent to support?
256. In what ways may injuries to a person's body occur? Define and explain each of the following offenses, and give the legal remedy: Threats, Assault, Battery, Wounding, Mayhem.
257. In what ways does the law secure protection to health?
258. What does Blackstone say in regard to the protection of a person's reputation? By what acts or offenses is a person's reputation injured?
259. Define Slander, and give the cases in which damages are recoverable. What is meant by slander per se? What defenses may be made to an action for slander?
260. Define Libel. What are the remedies? What defenses may be made to the action?
261. What is meant by malicious prosecution? What were the common law remedies? What are the four circumstances that must occur to entitle a person to damages?
262. What may be said as to the extent of personal security? How may the right be forfeited, or destroyed?
263. What is meant by Personal Liberty? How is this right protected from governmental interference?
264. What may be said of the importance of protecting this right?
265. What protection was given to personal liberty at common law? What were the remedies? What is meant by lawful imprisonment, and what is the remedy for an illegal imprisonment?
266. Discuss the writ of Habeas Corpus at common law.

267. Explain the action given for false imprisonment by the common law.

268. What may be said of the protection of personal liberty in the United States? What effect have the national and State constitutions on this right?

269. Discuss equality as guaranteed by the constitution. What provisions seek to secure it?

270. Discuss corporal liberty. In what three cases may individuals be deprived of corporal liberty? Discuss each of these cases.

271. Discuss religious liberty.

272. What is meant by liberty of speech and of the press? Discuss fully.

273. What is meant by the right of private property? What may be said as to the origin of private property?

274. What general protection was given to property at common law? When and how may private property be taken for public use?

275. Discuss the protection afforded private property in the United States.

276. What is meant by the eminent domain? When property is taken for the public use, how is the individual protected?

277. Are the rights of persons in contract protected?

278. Discuss the subordinate or auxiliary rights mentioned by Blackstone. Are these subordinate rights recognized in the United States?

279. Mention the securities given absolute rights in the United States. Are these securities increasing or diminishing?

280. Discuss the right to work. How may it be fully secured?

THE DOMESTIC RELATIONS.

281. What is meant by the Domestic Relations? What topics are included in the domestic relations?

282. Name some of the leading authorities who have written on the domestic relations, and give the names of their works.

Part I. Husband and Wife.

283. Define marriage. What incidents does Blackstone mention as necessary to a valid marriage contract?

284. Discuss the nature of the contract of marriage.

285. Define, explain and discuss the executory agreement to marry. What is the usual consideration in this contract? How may it be proven?

286. What is meant by a suit for breach of promise? When is the incapacity of the defendant to fulfill the promise a defense to the suit?

287. Name some of the things which will excuse the breach of promise to marry.

288. Define and distinguish between void and voidable marriages. What is the effect of a voidable marriage when set aside? Have modern statutes changed this rule? How?

289. What are the essential elements to a valid marriage as given by Schouler? What topics do these elements make it necessary to discuss?

290. What is meant by consanguinity? By affinity? Explain fully the prohibited degrees under the statute of 32 Hen. VIII. Within what degree of relationship are persons prohibited from marrying in your State? What difference between the English and American law in regard to affinity?

291. What may be said as to civil or social position as a disqualification to marriage? What races are forbidden to intermarry in some States?

292. Upon what ground is mental capacity required in parties to the marriage contract? What, in general, is the test of capacity? What may be said of drunkenness as incapacitating? What is the effect of mental incapacity upon the marriage?

293. What is meant by physical capacity to contract marriage?

294. What is the marriageable age at common law? By statute in your State? What effect has infancy, or non-age, upon the marriage contract? How may the marriage of an infant be ratified or disaffirmed?

295. What effect has a prior marriage undissolved upon a subsequent marriage? How have State statutes changed this rule?

296. Discuss force, fraud and error as grounds of invalidating the marriage contract.

297. Was a ceremonial marriage required by the common law? What two ways of expressing consent to the marriage

at common law? Does the common law marriage ceremony still prevail? Discuss fully.

298. What may be said of statutory formalities in the marriage celebration? What are the requirements in your State? Will the marriage be invalid if these are not observed? When will a statute requiring formalities invalidate the marriage if not observed?

299. Will a marriage of minors without the consent of parents be invalid?

300. Discuss foreign marriages? When are they valid? When invalid? What is the general rule?

Chapter II.

301. What may be said of the family? Which spouse was regarded as the head of the family? Discuss the status of the wife at the common law. Does the theory of the common law in regard to the wife still prevail?

302. What are the respective duties of the husband and wife?

303. Discuss the marital domicile.

304. What is said of the mutual rights of the spouses to each other's society and companionship? May the wife maintain an action against one for enticing away her husband?

305. Whose duty is it to provide for the support of the family? What is the wife's duty in this regard? In general, what is included in the family support?

306. What was the common law rule as to husband and wife being witnesses for or against each other? What was the reason of the rule? What is the statutory rule in your State?

307. Discuss the husband's liability for the wife's debts before marriage at the common law.

308. What, in general, are the statutory changes of the husband's liability for his wife's ante-nuptial debts?

309. What was the common law rule of the husband's liability for the wife's debts after marriage? Give the reason of the rule. Discuss the wife's disabilities at the common law.

310. Could husband and wife contract directly with one another at common law?

311. How was the common law doctrine modified by the equity courts?

312. Give a summary of the equity doctrine in regard to conveyances between husband and wife.

313. Discuss the power of the wife to bind her husband as his agent. When is her authority implied?

314. What is meant by necessities? When may the wife bind her husband for necessities?

315. Explain the liability of the husband for the wife's necessities when they are living together.

316. Discuss the husband's liability for wife's necessities when she is living apart from him.

317. Give the summary of the rules concerning the husband's liability for the wife's acts as his agent.

318. Explain the husband's liability for the torts of the wife at common law. For her crimes. What is the modern statutory rule?

319. What two classes of property belonging to the wife were affected by her marriage?

320. Discuss the effect of marriage upon the wife's personal property in possession. Her choses in action. What is meant by reducing to possession? What was the rule as to the wife's paraphernalia?

321. What changes have the modern statutes made in the common law rules as to the wife's personalty.

322. Discuss the effect of marriage upon the wife's real property at common law.

323. Explain the wife's dower interest in the property of her husband. What is the effect of marriage upon the wife's realty under the modern statutes?

324. Discuss fully the wife's property in equity. How was a separate equitable estate created?

325. Mention some phrases that are held sufficient to create the separate equitable estate.

326. Discuss the wife's separate estate as established by modern statutes.

327. Give a summary of the modern legislation affecting the property of married women. What are the property rights of the wife in your State?

328. May the husband's vested rights in his wife's property be impaired by legislation? How may the wife charge her separate property for family supplies? What is necessary for a married woman to carry on a business in your State?

Chapter III.

329. How is separation distinguished from divorce? How far are separation deeds recognized in your State?

330. When the wife is abandoned by her husband, are her powers to contract and sue enlarged?

331. What three sorts of divorces are recognized by law?

332. Define and discuss a divorce of nullity.

333. What is meant by a divorce absolute or "a vinculo?" What is the chief ground for granting this divorce? What other grounds are given in some States? In your State?

334. What is meant by a partial divorce, or divorce from bed and board? What are the grounds for granting this divorce in New York? Is a partial divorce granted in your State?

335. What defenses may be made to a suit for a divorce? Define and explain connivance, collusion, condonation, recrimination.

336. Discuss the effect of an absolute divorce on the property rights of the parties. What is the effect of a partial divorce on the property rights of the parties?

337. Define and discuss alimony.

338. How may divorces be impeached? Who may question the validity of a divorce?

Part II. Parent and Child.

339. What may be said of parent and child as a domestic relation?

340. Define and distinguish between legitimate and illegitimate children. What fixes the domicile of a child?

341. Explain what is meant by adoption, and give the statutory requirements for adopting a child in your State.

342. What, in general, are the duties of the parent to legitimate children? Define and discuss the duty of maintenance; of protection; of education.

343. When is the father bound for the debts or contracts of his child? When is the child supposed to supply his own necessities? Can the child bind the parent for necessities when away from home without the consent of the parent?

344. What is said of the right of the parents to control their children?

345. Discuss the parents' power of correcting the child.

346. Which of the parents, at common law, has the pri-

mary right to the custody of the children? How is custody regulated by statute? Which parent is entitled to custody in case of divorce? How may parents relinquish this right?

347. Is the parent entitled to the service and earnings of the child? For how long? May the right be waived? Discuss fully.

348. What right has the parent to the child's separate property?

349. Discuss the parents' right of action for injuries to the child. Upon what is the action founded? Was there an action at common law for the instantaneous death of the child? Is there now?

350. For what torts of the child is the parent responsible? Discuss fully.

351. What may be said of the duty of children to the parents? Are children bound to support indigent parents?

352. What is meant by emancipation of the child? How is it done, and what is the effect of emancipation?

353. What may be said of voluntary gifts and conveyances between parent and child?

354. Discuss the status and rights of illegitimate children at the common law. Could they inherit? What changes have modern statutes made in this rule?

Part III. Guardian and Ward.

355. What is meant by persons *in loco parentis*?

356. How does guardianship arise?

357. Discuss guardianship at common law, and distinguish between guardians by nature, for nurture, and in socage. What power did the lord chancellor have as a guardian?

358. Discuss fully the origin of guardianship in the United States. What difference between *chancery*, testamentary and probate guardianship? Has the *chancery* court jurisdiction where special probate courts have been established?

359. Who, in general, is the natural guardian of a child?

360. How does the guardian get his authority? How is he specially appointed? When may the father or mother appoint a guardian for his or her minor children? How is testamentary guardianship regulated?

361. When does the court appoint the guardian? Discuss the usual method of appointing by the court. When may the

child select his own guardian? Is a bond required of the guardian?

362. In general, what court has jurisdiction to appoint?

363. What discretion has the court in appointing a proper guardian? What preference is given the parents and next of kin by statute in your State?

364. Are the rights of a guardian properly appointed and acting within his authority superior to the wishes of a parent? How may the rights of the guardian be restrained?

365. What, in general, are the duties of a guardian as to the person of his ward? Do the guardian's duties continue if the ward has no property?

366. What is the guardian's duty as to the ward's property? May the guardian become personally liable for loss of the ward's property? What should the guardian do with the surplus of the ward's property? How are investments of the ward's property regulated in some States?

367. Discuss fully when and how the guardian may sell the ward's real property.

368. When is the guardian required to account to the court as to the condition of the ward's estate? May intermediate accounts be inquired into afterward? May a final account be opened after once approved?

369. When and how is the guardian's authority terminated? For what reasons may a guardian be removed before the expiration of the ward's minority?

370. What provision is made for compensating guardians in your State?

371. What, in general, are the rights of the ward to restrain and call the guardian to account during the continuance of the guardianship? Can the guardian bind the ward outside of the scope of his general powers? What is said as to gifts or conveyance from ward to guardian? What is a guardian *ad litem*?

372. Discuss fully the relation of teacher and pupil. When is the teacher liable for correcting a pupil? Does the teacher's authority extend to acts outside of the school-room?

Part IV. Infancy.

373. Who are infants? What is the age of majority in your State?

374. What are some of the general disabilities of infants?
375. Discuss the infant's liability for crimes. Under what age is a child incapable of committing crime?
376. What is the test of an infant's capacity to testify as a witness?
377. What is the capacity of an infant to make a will at common law? By statute in your State?
378. Discuss void and voidable contracts of an infant. What contracts of an infant are binding?
379. Discuss the infant's necessities. When is he liable for necessities? Does the doctrine of necessities apply to the infant's trade contracts? What may be said of education as a necessary? What is the rule as to the infant's written obligation given for necessities?
380. What contracts of an infant are void? How has the older rule been modified?
381. Who may ratify or disaffirm the infant's contracts? When may the infant avoid the contract? What is the rule as to the return of the consideration when a contract is avoided by an infant?
382. What is meant by ratification? How may it be done? Discuss fully.
383. Give instances of what constitutes a ratification. Of what does not. Have the statutes of your State prescribed any time within which the infant must make his election to avoid? When there is evidence tending to show ratification, is it a question for the court or the jury?
384. What is the infant's liability for torts committed by him? If the infant's tort is founded on contract, is he liable?
385. Is an infant liable for false representations as to his age? Is this regulated by statute in your State?
386. What is the rule as to injuries and torts suffered by an infant? Does the doctrine of contributory negligence apply? What care must the child generally exercise? May a child be so young as to be presumed incapable of exercising care?
387. Will the negligence of the parents or those in charge of the infant affect the right to recover? What difference exists in the authorities?
388. Can an infant sue in person or by attorney? How does an infant sue? Is an infant bound by a judgment properly secured against him?

Part V. Master and Servant.

389. What may be said of master and servant as a domestic relation? Why was it more of a domestic relation at common law than at present?

390. What criticism of the term master and servant does Professor Schouler make? Is it a natural relation? What can you say of its origin? In what way could the relation of master and servant or employer and employed be done away with? Explain in what way the man who is compelled to part with his labor for a price fixed by his employer is more free than the slave.

391. Discuss the classes of servants at the common law.

392. How was the wages of servants fixed at the early common law? Had the master the right to chastise the servant?

393. At common law, what were the respective rights and responsibilities of the master and of the servant?

394. How does the relation of master and servant or employer and employed arise under modern law?

395. What may be said of the formation of the relation of employer and employed? How may the assent of the employer to the contract be implied? What is the test of the existence of the relation?

396. When must the contract of hiring be in writing? In the absence of express terms how may the term of the hiring be determined?

397. How is the relation terminated? For what reasons may the employer discharge the employe? Discuss each. For what causes may the employe quit the service?

398. What was the former rule as to the payment of wages when the employe was discharged for cause by the master? What is the rule now? What is the rule as to recovery of wages when the servant is wrongfully discharged? What remedies has the servant?

399. Specify the general duties of the employer to his employes.

400. What are the rights of the employe under the contract of hiring? What are his liabilities to the master?

401. To what extent is the master liable to others for the torts of his servants or employes?

Questions given students and candidates for admission to the Ohio bar in 1892:

PERSONAL RIGHTS.

1. What do you understand by the term "personal rights?"
2. Name the personal rights and any subdivisions in tabular form or diagram.
3. How are personal rights guaranteed to the people in the several States?
4. Is there any limitation upon the rights of a person to use his property as he pleases? If so, state the limitation.
5. State the remedies (not punishments) for an infraction of the several rights named in your answer to question No. 2.

DOMESTIC RELATIONS.

1. How is marriage dissolved in Ohio? Give five reasons in law for such dissolution.
2. At what age can persons marry in Ohio, and under what age must consent be obtained of parents or guardian?
3. When may the probate court remove any guardian?
4. Give the classes into which servants were divided under the common law.
5. Does the relation of parent and child imply any authority of agency by which the parent can act for the child or the child for the parent without special appointment or authority? Give reason for answer.*

*Students will take notice that many points covered in this book are regulated by statute in the several States. And as it is impossible in a work of this character to notice every local statute, attention has been called in the text and in the questions to such rules as are chiefly statutory, that the student may ascertain what the statutes of his State have determined the law to be. Each student preparing himself for active practice should make a note of these points and then by reference to the statutes add to the text the statutory rule in his particular State.

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